

1 STATE OF MINNESOTA DISTRICT COURT
2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 -----

4 The State of Minnesota,
5 by Hubert H. Humphrey, III,
6 its attorney general,
7 and
8 Blue Cross and Blue Shield
9 of Minnesota,

10 Plaintiffs,

11 vs. File No. C1-94-8565

12 Philip Morris Incorporated,
13 R.J. Reynolds Tobacco Company, Brown
14 & Williamson Tobacco Corporation,
15 B.A.T. Industries P.L.C., Lorillard
16 Tobacco Company, The American
17 Tobacco Company, Liggett Group, Inc.,
18 The Council for Tobacco Research-U.S.A.,
19 Inc., and The Tobacco Institute, Inc.,

20 Defendants.

21 -----

22 DEPOSITION OF MARK JOSEPH BROWNE

23 Volume I, Pages 1 - 219

24

25

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1 (The following is the DEPOSITION OF MARK JOSEPH
2 BROWNE, Ph.D., taken pursuant to Notice of Taking Deposition,
3 at the law offices of Dorsey & Whitney, Pillsbury Center
4 South, 14th Floor, 220 South Sixth Street, in the city of
5 Minneapolis, state of Minnesota, commencing at approximately
6 9:05 A.M., September 17, 1997.)

7 APPEARANCES:

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3 (Whereupon, Original transcript to Stirewalt &
4 Associates.)

5 * * *

6 P R O C E E D I N G S

7 (Witness Sworn.)

8 MARK JOSEPH BROWNE, Ph.D.

9 Called as a witness, being first duly sworn,
10 was examined and testified as follows:

11 EXAMINATION

12 BY MS. RICHARD-NELSON:

13 Q. Good morning, Mr. Browne.

14 A. Good morning.

15 Q. Would you please state your full name and address for the
16 record?

17 A. Mark Joseph Browne. [DELETED],
18 [DELETED].

19 Q. Mr. Browne, my name is Susan Richard Nelson. And I am
20 one of the lawyers representing the state of Minnesota and
21 Blue Cross and Blue Shield in litigation pending against the
22 tobacco industry in the state of Minnesota. And I will be
23 taking your deposition today and, perhaps, another day in
24 connection with your work as an expert witness testifying on
25 behalf of the tobacco industry in that litigation. Do you

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1 understand that?

2 A. Yes.

3 Q. And I'd like to begin with a few rules or procedures for
4 deposition taking so that we can get through this
5 expeditiously. First, if I ask you a question and you don't
6 understand it, would you please seek a clarification from me?

7 A. Yes.

8 Q. And if you don't do that, may I assume that you've
9 understood the question?

10 A. Okay.

11 Q. Now, the court reporter will be taking down the testimony
12 and it will be important for us not to interrupt each other.
13 So I will try not to interrupt your answer and if you would
14 be so kind as not to interrupt my question, then she will be
15 able to get the testimony down. Is that fair?

16 A. Yes.

17 Q. And I can see you're doing a good job of responding
18 verbally. Sometimes in conversation we respond with a nod of
19 the head and here it's important that we give verbal
20 responses. Do you understand that?

21 A. Yes.

22 Q. Now, there are some special rules that apply to this
23 deposition. One, is that you're not permitted to consult
24 with counsel while you're in the room in the deposition. We
25 will take a break from time to time and you can consult

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1 outside of the room. But in these expert depositions in this
2 litigation, we are not permitting, on either side, experts to
3 consult with counsel in the room. Do you understand that?

4 A. Yes.

5 (Browne Exhibit 4200 was
6 marked for identification.)

7 BY MS. RICHARD-NELSON:

8 Q. Mr. Browne, I show you what the court reporter has marked
9 as Defendants' Exhibit 4200. That says Browne and we're
10 going to change that.

11 (Defendants' Exhibit 4200 was
12 marked for identification.)

13 BY MS. RICHARD-NELSON:

14 Q. I show you what's been marked as Defendants' Exhibit
15 4200. Have you seen this document before? I will represent
16 to you, Sir, that this is the notice of taking expert
17 deposition of Mark Joseph Browne in the pending litigation.

18 A. I don't recall seeing it before.

19 Q. Okay. Were you aware -- if you turn to page 2 for a
20 moment and look at the first full paragraph it states: The
21 deponent should send five days in advance of the deposition
22 that which is specified in Judge Fitzpatrick's order of March
23 13, 1997 stated below: Capital D. Scope of document
24 Discovery of Experts. Number 1. Published reports or
25 Articles: At the time of service of the expert reports, the

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1 party shall provide a listing of all reports and articles
2 published by each expert. Upon request, the party which has
3 retained the expert shall provide opposing counsel with
4 copies of any such reports or articles. It is specifically
5 requested as enunciated in the order that defendants provide
6 plaintiff five days before this deposition with copies of any
7 reports or articles listed by this expert. Do you see that
8 language, Sir?

9 A. Yes. I do.

10 Q. Now, subsequent to the time of the service of this notice
11 of deposition there was a protocol reached between the
12 parties which called for the production of only those reports
13 or articles which are relevant to this litigation. Were you
14 aware of that?

15 A. I don't believe that that was told to me.

16 Q. Let me ask you: Have you at any time gone through your
17 published reports or articles and determined which of them
18 would be relevant to this litigation?

19 A. Yes.

20 Q. And this morning your counsel gave to me at the
21 deposition five articles -- and I will identify them for the
22 record and at a later time we will mark them. The first is
23 called Asymmetric Information and the Demand for Medigap
24 Insurance. The second, Information Asymmetries and Adverse
25 Selection in the Market for Individual Medical Expense

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1 Insurance. The third is Evidence of Adverse Selection in the
2 Individual Health Insurance Market. The fourth is State
3 Restrictions on Health Insurance Underwriting Criteria. The
4 effect on the Uninsured Population. And the last is
5 Explaining Insurance Policy Provisions via Adverse
6 Selection. Perhaps we will mark these and make copies
7 later. Why don't we do that.

8 (Defendants' Exhibits 4201 through 4205
9 were marked for identification.)

10 BY MS. RICHARD-NELSON:

11 Q. Mr. Browne, I show you what's been marked Defendants'
12 Exhibit 4201, Defendants' 4202, Defendants' Exhibit 4203,
13 Defendants' Exhibit 4204 and Defendants' Exhibit 4205. And I
14 would ask that you confirm that these are the articles, the
15 titles of which, I just read into the record?

16 A. Yes. They are.

17 Q. Mr. Browne, what criteria did you use for selecting these
18 articles from your list of published articles? That is, how
19 did you determine that these were the relevant articles?

20 A. They have to do with adverse selection and underwriting.

21 Q. Have you published any other articles that have to do
22 with underwriting or adverse selection?

23 A. I don't believe so.

24 Q. Have you published any other materials that utilize the
25 National Medical Care Expense Survey?

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1 A. The National --

2 Q. Expenditure Survey. National Medical Care Expenditure
3 Survey. Excuse me.

4 A. Okay. I think that I have.

5 Q. And were you at any time aware of any relevance that that
6 survey and your articles pertaining to that data may have in
7 this litigation?

8 A. There was a survey taken ten years after NMES, the
9 National Medical Expenditure Survey or expense survey, that
10 was used in the report of -- I believe, the name is Zygant
11 (Ph).

12 Q. Mr. Zeger Wyant? That report?

13 A. That's right.

14 Q. Okay. Are there any other articles that you have ever
15 published or reports that you have written which, in any way,
16 have to do with the subject of group medical health
17 insurance?

18 A. My dissertation which technically is published, although
19 it's not an article. There was an article in the Journal of
20 Actuarial Practice, I believe is the title of the journal,
21 which looked at health insurance. I don't recall if I looked
22 at group health insurance or not in that article. That may
23 have.

24 Q. Do you recall roughly the year of that article?

25 A. I believe that it was published two or three years ago.

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1 I don't know exactly.

2 Q. And do you have a copy of your dissertation?

3 A. Yes. I do.

4 Q. And the article that is entitled Defendants' Exhibit
5 4203, does that represent any portion of your dissertation?

6 A. That represents the major portion of the dissertation.

7 Q. But there are differences between the dissertation and
8 the article?

9 A. Yes.

10 Q. Could you describe for me the differences? Is one more
11 inclusive than the other, or are there actually different
12 findings?

13 A. The findings are similar. The major findings of the
14 study are. The dissertation has a lot more review of the
15 literature in it. I believe that that's the major
16 difference.

17 Q. Does the dissertation rely in any fashion on the National
18 Medical Care Expenditure Survey?

19 A. Yes. That was the data that I used, just as in this
20 article.

21 Q. Now, apart from the dissertation and the article in the
22 Journal of Actuarial Practice that you just mentioned, can
23 you think of any other articles or reports that you have ever
24 written pertaining to the topic of group insurance? Group
25 health insurance?

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1 A. Not that I can think of right now.

2 Q. Can you think of any other articles or reports that you
3 have written which address in any fashion differentiating
4 premium as between members of the group for any reason?

5 A. Not any besides the ones we've talked about just now.

6 Q. Have you ever written an article or report which
7 addresses the question of utilizing a differential premium in
8 any kind of a health insurance policy for purposes of
9 incentivizing healthy behaviors?

10 A. Certainly, the articles that I've written would touch on
11 that, but nothing besides what we've talked about, and that
12 was not the central thrust of the articles that we have
13 talked about.

14 Q. But any article in which that was discussed at all we've
15 talked about and, by that I mean, they're either marked as an
16 exhibit here or they're your dissertation or the article in
17 the Journal of Actuarial Practice?

18 A. Repeat the question.

19 Q. That was probably confusing. You just mentioned that you
20 may have touched upon the issue of utilizing a differential
21 premium in a health policy to incentivize healthy behavior.
22 And my question is: Where would I find that discussion you
23 may have had in any article?

24 A. I think in most of the articles that we've talked about
25 the idea that incorporated that if people pay different costs

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1 for their health insurance, or more central to my paper, is
2 if the price that's charged to them is different, then they
3 have different incentives as to whether or not to buy the
4 insurance.

5 Q. And are there any papers other than those marked as
6 exhibits that you've just reviewed that would address that
7 issue?

8 A. Not that I can recall.

9 MS. RICHARD-NELSON: Mr. Wilson, I would
10 request a copy of the dissertation and the article in the
11 Journal of Actuarial Practice.

12 (Defendants' Exhibit 4206 was
13 marked for identification.)

14 BY MS. RICHARD-NELSON:

15 Q. Mr. Browne, I show you what's been marked as Defendants'
16 Deposition Exhibit 4206, and ask whether you've ever seen
17 that document before? For the record, Defendants' Deposition
18 4206 is this Court's order dated March 13, 1997, regarding
19 deposition and expert witness provisions. Specifically, Mr.
20 Browne, the expert witness provisions can be found on pages 7
21 and 8 of the order. Can you recall having seen this order
22 before?

23 A. I believe that this was given to me before.

24 Q. And do you recall whether you reviewed it to ensure that
25 you had complied with it prior to the date that your expert

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1 report was due?

2 A. In what sense?

3 Q. Well, let's walk through this together and perhaps that
4 would assist you. It says: Roman numeral II, Expert
5 Witnesses, at the top of the page. Are you with me?

6 A. Yes.

7 Q. And capital A, Reports. Are you still with me?

8 A. Yes.

9 Q. Number 1. For each expert, at the time of designation of
10 such expert and notice to the opposing side, the designating
11 party shall provide. Did you have an understanding that at a
12 certain point in time as an expert for the tobacco industry
13 you had an obligation to produce certain things to counsel
14 for the State and Blue Cross?

15 A. I understood that I was to produce a report which
16 contained my opinions.

17 Q. Okay. Well, let's look at paragraph 1 A. A full and
18 complete report prepared and signed by the expert setting
19 forth the subject matter on which the expert is expected to
20 testify, and setting forth the substance of the facts and
21 opinions to which the expert is expected to testify and a
22 summary of grounds of each such opinion. Did I read that
23 correctly?

24 A. Yes.

25 (Defendants' Exhibit 4207 was

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1 marked for identification.)

2 BY MS. RICHARD-NELSON:

3 Q. Mr. Browne, I show you what's been marked as Defendants'
4 Exhibit 4207, and I'd ask you to take a moment to review it.

5 A. Are we done with this?

6 Q. No. We're not. So why don't you keep it in front of you
7 and take a look.

8 A. Okay. (Reading). Okay.

9 Q. Mr. Browne, is Defendants' Exhibit 4207 the document that
10 you submitted in compliance with paragraph Roman Numeral II,
11 Capital A, 1, little A of this Court's order dated March 13,
12 1997?

13 A. The exhibit contains more than that.

14 Q. Okay.

15 A. But it does contain that.

16 Q. Does it contain the full and complete report referenced
17 in paragraph 5 of that order?

18 A. It does contain that.

19 Q. Does the exhibit, Defendants' Exhibit 4207, also contain
20 what is contained in paragraph little B of the order, a
21 current and complete curriculum vitae of the expert?

22 A. Yes.

23 Q. Does it contain what is listed under paragraph little C
24 of the order, a listing of all publications of the expert?

25 A. All refereed publications. I wrote an editorial once

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1 that is not included.

2 Q. Where did you write that -- Where was the editorial
3 written -- published?

4 A. It was in the National Underwriter.

5 Q. Do you know what date that was?

6 A. No. I'm sorry. I don't. It was prior to my entering
7 the doctoral program. That's why it doesn't appear on my
8 CV. It was not a refereed publication. I would guess it was
9 in the early 80's.

10 Q. What was the subject matter of the editorial?

11 A. At the time there was discussion by a Senator Packwood of
12 whether the government should impose unisex rating. That was
13 the issue I was addressing.

14 Q. And what was your opinion?

15 A. That the government should not impose a unisex rating, as
16 I recall.

17 Q. Why?

18 A. This is going back quite a ways, so I don't remember
19 exactly what my argument was. I believe it was simply that
20 there are risk differences between genders.

21 Q. This is in the context of health insurance?

22 A. This was in the context of all types of insurance.

23 Q. Do you know whether it is consistent with the law today
24 to rate based on gender?

25 A. It is in some states, but not others.

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1 Q. Is it in the state of Minnesota?

2 A. I'm not sure.

3 Q. Apart from the editorial in the National Underwriter
4 sometime in the early 80's on the subject of unisex rating,
5 does Defendants' Exhibit 4207 contain a complete listing of
6 all your publications?

7 A. There aren't any other ones that I recall.

8 Q. There is a reference somewhere to a World Book
9 Encyclopedia article, am I correct?

10 A. That's right. I had totally forgotten about that.

11 Q. And what is that about?

12 A. I believe that what it has to do with is national health
13 insurance.

14 Q. Was it published in the World Book Encyclopedia?

15 A. Yes. It was.

16 Q. Do you know what year?

17 A. I would have to guess, but it was certainly within the
18 last five.

19 Q. Was it published under the topic health insurance?

20 A. I believe it was under the heading national health
21 insurance.

22 Q. And what was the article about?

23 A. I think that what I did in that was simply said what
24 national health insurance was. And I think I talked a little
25 bit about how it works in Canada.

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1 Q. Do you recall whether the article addressed issues of
2 health care reform in this country?

3 A. I think that it probably did to some extent.

4 Q. Do you have a copy of that article?

5 A. I might. I could check in my files.

6 MS. RICHARD-NELSON: I would ask for a
7 copy of that article as well.

8 BY MS. RICHARD-NELSON:

9 Q. Now, have we covered ever publication that we can recall
10 whether peer-reviewed or not?

11 A. Like I said before, I think that we have, but there may
12 have been other things that I've written that I don't
13 recall. But I think that we have.

14 Q. Okay. In connection with your work on the student health
15 insurance program at the University of Wisconsin, did you
16 publish anything in any newsletters or internal pamphlets or
17 newspapers published on campus on that subject?

18 A. I didn't.

19 Q. Turning for a moment to page 4 of your resume, which can
20 be found at the -- under Defendants' 4207. Do you see where
21 it says, Research and Publications in Progress?

22 A. Yes.

23 Q. Have any of those publications now been published?

24 A. Yes. They have.

25 Q. Which ones?

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1 A. The first one, Virginia Young and Mark J. Browne,
2 "Optimal Insurance and Adverse Selection", that's been
3 accepted for publication. I don't subscribe to the journal
4 so I don't know if it's actually in print or not. The second
5 one, Mark J. Browne, "Health Insurance for the Uninsurable":
6 State High Risk Pools". That has been published. That was
7 published this summer. I actually didn't receive a copy of
8 the journal. The third one, Joan T. Schmit, Mark J. Browne
9 and Han Duck Lee. "Tort Reform and the Rate of Tort Filings:
10 Evidence from the State Courts". That was published not in
11 the Journal of Risk and Insurance, but in the Risk Management
12 and Insurance Review.

13 Q. When was that published?

14 A. This past summer.

15 Q. Okay.

16 A. That actually is the article that's at the top of page 5
17 that I just said. That's the one that was published.

18 Q. Okay.

19 A. The others are under review. The third one -- or second
20 one from the bottom on page 4, that actually turned into the
21 article that is at the top of page 5.

22 Now that I'm looking at current or prior
23 research, I also recall that I presented a paper at a
24 conference in Mexico City this summer that was published in
25 the proceedings of that meeting which I don't have listed.

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1 Q. What was the subject matter of your paper?

2 A. The international demand for property and liability
3 insurance.

4 Q. Anything else that's missing?

5 A. Not that I recall.

6 Q. Would you take a moment and look at your conference
7 papers and presentations that begin on page 3 and go to page
8 4. First of all, do you believe that this is a complete
9 listing of your conference papers and presentations with the
10 exception of the Mexico City conference?

11 A. I believe that this is a complete listing through January
12 of '97, which is the date I've stipulated on the CV. So
13 there are other papers that have been presented since then
14 that would not be contained.

15 Q. But you'll probably note that on the court's order the
16 listing has to be current as of the date of the production of
17 the report. So now what we'll have to do is update it from
18 January of '97 up through the present time.

19 A. Okay. This was my most current CV at the time of the
20 report. I certainly understand the concern.

21 Q. Okay. Can you identify for me any publications, any
22 conference papers, any presentations or other items that
23 would update your resume so that you could state that it is a
24 resume updated as of today?

25 A. In all categories?

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1 Q. In all categories. Would academic experience change?

2 A. No. It wouldn't.

3 Q. Would special honors and awards change?

4 A. Yes. The paper that I receive -- that I presented at the
5 conference in Mexico City won a prize for being one of the
6 better papers of the conference.

7 Q. What about publications, journal articles, apart from
8 what we've already discussed?

9 A. I think that we've covered all of the updates.

10 Q. Conference papers and presentations?

11 A. The presentation in Mexico City. There was also a
12 presentation that I made at the annual meeting of the
13 American Risk and Insurance Association in San Diego this
14 summer.

15 Q. Would you say that again? Annual meeting of American --

16 A. Risk and Insurance Association.

17 Q. Okay. And was that paper published in the proceedings of
18 that meeting?

19 A. There were no proceedings for that meeting.

20 Q. Was there a document provided to everybody who attended
21 the meeting that contained the papers that were presented?

22 A. Yes.

23 Q. Do you have a copy of that?

24 A. I'm sorry. Your prior question, were you asking if there
25 was a document provided that contained all of the papers?

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1 Q. Yes.

2 A. Or a listing of the papers?

3 Q. Contained the papers.

4 A. I'm sorry. I misinterpreted. The document contained a
5 listing of the papers, but not the papers themselves.

6 Q. Do you have a copy of the paper you presented at the
7 annual meeting of American Risk and Insurance Association
8 this summer?

9 A. What I presented were overheads that contained data
10 analysis. Since then we've finished writing the paper and we
11 just submitted it for review. I do have that.

12 Q. Is it identified on this resume?

13 A. Under research support.

14 Q. Yes.

15 A. There's a line, Economic and Market Predictors of
16 Insolvencies in the Life Insurance Industry. The paper came
17 from that research and it has a similar, if not the same,
18 name.

19 Q. Was your presentation this summer at the annual meeting
20 of American Risk and Insurance Association exclusively on the
21 subject of data analyses pertaining to life insurance?

22 A. That was the gist of it. What we did in the paper was
23 tested it to see if there were macroeconomic variables such
24 as interest rates and unemployment rates that affected the
25 rate of insolvency of life insurance companies.

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1 Q. Okay. Any other conference papers or presentations that
2 you can recall?

3 A. Next month there's going to be a presentation in
4 Washington D.C. that has to do with predicting financial
5 success of life insurance companies which is related to their
6 operating characteristics and different macroeconomic
7 variables. That is also part of the Society of Actuaries
8 grant that I referred to a moment ago.

9 Q. Are you a member of the Society of Actuaries?

10 A. No. I'm not.

11 Q. Are you a licensed actuary?

12 A. No. I'm not.

13 Q. Any other research and publications in progress or
14 research support that we haven't discussed?

15 A. There were two questions there, I believe.

16 Q. Yes. Should I break it down for you? Are there any
17 other research and publications in progress?

18 A. Yes.

19 Q. Okay. And what are those? Apart from what's on the
20 resume.

21 A. Okay. I'm currently writing a paper with Robert Puelz
22 that has to do with the effective tort reform on damage
23 awards generally.

24 Q. Is that paper being funded? Being paid to write that
25 paper?

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1 A. No. Unfortunately not.

2 Q. Have you ever received funding or grant money for any of
3 your work on tort reform?

4 A. No. But I tried.

5 Q. How do you spell Mr. Puelz' last name?

6 A. P-U-E-L-Z. Actually, let me respond earlier. My
7 coauthors may have received funding from their universities.
8 That's possible with the tort reform work.

9 Q. But apart from funding from the universities, you're not
10 aware of any other funding source for that tort reform work?

11 A. We were provided data which had value.

12 Q. Who gave you it?

13 A. That's confidential.

14 Q. Well, in this litigation you are required to disclose
15 that, but we will mark the deposition confidential under the
16 protective order, which I'm sure you've signed. And the
17 parties are subject to sanctions for disclosing any of that
18 outside of the litigation. You may consult with your counsel
19 if you wish, but that is what the court's ruling is.

20 MR. WILSON: Would you like to do that?

21 THE WITNESS: My coauthor arranged to
22 receive this data and his agreement was that we would not
23 disclose who provided the data.

24 MR. WILSON: Can I make a suggestion?

25 MS. RICHARD-NELSON: Sure.

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1 MR. WILSON: Perhaps you could ask
2 whether any of the funding came from any of the tobacco
3 entities or whether the data did.

4 MS. RICHARD-NELSON: Actually, that's not
5 the question. We'll put this on hold until after the lunch
6 break.

7 MR. WILSON: Maybe we could just take a
8 minute and I can talk to him.

9 MS. RICHARD-NELSON: Why don't we do
10 that.

11 (Recess taken.)

12 BY MS. RICHARD-NELSON:

13 Q. Are you able to answer the question?

14 MR. WILSON: Can we have the -- why don't
15 you ask the question or let's read back the one that was
16 pending.

17 BY MS. RICHARD-NELSON:

18 Q. Mr. Browne, you've had an opportunity to consult with
19 counsel?

20 A. Yes.

21 Q. Are you able to disclose for me the identity of the
22 source of the funding on the tort reform publication?

23 A. What I would like to do is talk to my coauthor who spoke
24 with the data provider. If it's all right with him, I'd be
25 happy to provide the name.

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1 Q. Okay. Is that something you'll be able to do during the
2 break this morning?

3 A. Probably not. But it's something I could certainly do
4 tomorrow.

5 Q. Okay. Chances are, at this rate, we're got not going to
6 finish today anyway. So, possibly, when we come back for our
7 second day we can address the issue.

8 A. That would be fine.

9 Q. Are there any other research and publications in progress
10 that we have not yet discussed?

11 A. There's another paper that I've just begun work on that
12 has to do with automobile tort reform. In particular, giving
13 insureds a choice between no-fault and the tort system.

14 Q. Anything else?

15 A. I'm writing a paper on the National Flood Insurance
16 Program.

17 Q. Any else?

18 A. That's all that I recall right now.

19 Q. Is there anything that you have done since January of
20 1997 under the title, Research Support that is not disclosed
21 on your resume?

22 A. I have nothing to add to that category.

23 Q. Okay. Under Teaching, is there anything that you would
24 add to update your teaching at the undergraduate level?

25 A. I'm currently teaching a course entitled Principles of

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1 Risk Management.

2 Q. Do you address risk management in the context of health
3 care in that course?

4 A. One or two lectures.

5 Q. Have you given the lectures on health care yet?

6 A. I taught the course in the spring as well as currently,
7 and I did in that semester.

8 Q. In either of those lectures did you address the
9 utilization of a differential premium in a group health
10 insurance policy?

11 A. I do talk about underwriting and charging different
12 premiums for different risks.

13 Q. In the group setting?

14 A. In the general sense.

15 Q. Have you specifically talked about charging different
16 premiums for different risks in the group setting? And by
17 group setting, I mean employer groups.

18 A. Not in that course.

19 Q. Have you discussed utilizing differential premiums for
20 health insurance in employer groups in any of your
21 undergraduate courses?

22 A. In the employee benefits course.

23 Q. And that's the first course listed, Employee Benefits
24 Management.

25 A. That's correct.

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1 Q. What risks have you identified in that course that you
2 address the issue of differential premiums for?

3 A. A lot of different -- such as -- I'm sorry.

4 Q. I want to make a clarification. I'm not talking about
5 factors used to underwrite. I'm talking about differential
6 premiums. Actually different premiums paid by different
7 members in the same employer group as opposed to, say,
8 utilizing age or sex or occupation in underwriting.

9 A. Okay.

10 Q. So I want to make that distinction.

11 A. Okay.

12 Q. With that distinction in mind, in your Employee Benefits
13 Management course, did you address utilizing differential
14 premiums in a group health insurance policy based on risk?

15 A. Yes.

16 Q. And what risks did you address?

17 A. Family composition.

18 Q. So, in a single group, members of that group would pay
19 differing premiums based on their family composition?

20 A. That's correct.

21 Q. And what do you mean by family composition?

22 A. Whether the employee is married, has children, is a
23 domestic -- has a domestic partner.

24 Q. And this is something different than paying dependent
25 coverage? This would actually be rating the employee

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1 contribution based on their family composition as opposed to
2 paying an additional dependent coverage?

3 A. I'm sorry. Could you clarify that?

4 Q. Okay. For instance, at my place of employment there is a
5 premium charged to all employees. It's the same premium.

6 But if I wish to cover my children, then there's an
7 additional premium and we call it dependent coverage?

8 A. That's what I'm referring to.

9 Q. Okay. All right. Are there any other risks for which
10 you discuss differential premiums in your Employee Benefits
11 Management course in the context of an employer group
12 setting?

13 A. Not that I recall.

14 Q. You don't discuss smoking differentials?

15 A. Certainly that has come up in class discussions. From
16 semester to semester, discussions will be different depending
17 on what questions the students ask. My class tends to be
18 interactive a fair amount.

19 Q. I guess, my question is: Was it a part of the
20 curriculum?

21 A. No.

22 Q. Does the issue of differential premiums for different
23 risks in the employer group setting come up in any other
24 undergraduate courses that you have taught?

25 A. No.

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1 Q. Do you need to update your MBA program teaching on this
2 resume?

3 A. No. I don't.

4 Q. How about your Ph.D. teaching?

5 A. Currently, I am teaching a class that is entitled Health
6 Insurance.

7 Q. At Ph.D. level?

8 A. That's right.

9 Q. Anything else?

10 A. No.

11 Q. Mr. Browne, in any of the courses you teach at the MBA or
12 Ph.D. level have you addressed the subject of differentiating
13 premiums based on risk among members of an employer group?

14 A. No.

15 Q. Under the subject matter Dissertation Committees, is
16 there anything you need to update.

17 A. The final individual, David Mott, he completed his
18 dissertation.

19 Q. Anything else?

20 A. No.

21 Q. Have you ever directed or supervised a dissertation which
22 addressed the question of differentiating premium in an
23 employer group setting based on risk?

24 A. No.

25 Q. Turning for a moment to -- I want to have you look at

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1 both Defendants' 4206 and 4207 at the same time. But look at
2 4206 for a moment. Under paragraph Roman Numeral II A, 1,
3 little D. Are you with me?
4 A. Two, A, 1, D?
5 Q. Yes.
6 A. Yes.
7 Q. And that's states: A listing of all matters in which the
8 expert has testified, by deposition, at legislative or
9 administrative hearings or at trial, and the dates thereof.
10 Have I read that correctly?
11 A. Yes.
12 Q. Does your resume currently list all matters in which you
13 have testified by deposition at legislative or administrative
14 hearings or at trial on the dates thereof as of today?
15 A. That's not part of my resume, but it is part of my
16 report.
17 Q. And where can it be found?
18 A. The page preceding the start of my resume.
19 Q. And I see listed there three instances of prior
20 testimony; is that correct?
21 A. That's correct.
22 Q. Let's begin with the first, Fry versus Blue Cross and
23 Blue Shield of Alabama. It states that you gave both
24 deposition and court testimony; is that correct?
25 A. That's correct.

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1 Q. Were you a fact witness or an expert witness in that
2 litigation?

3 A. I was an expert witness.

4 Q. On behalf of which party?

5 A. Fry.

6 Q. And was it Mr. or Mrs. Fry?

7 A. Mr. Fry.

8 Q. Okay. And what was the nature of Mr. Fry's claim against
9 Blue Cross and Blue Shield of Alabama?

10 A. Essentially, he felt that there was medical expenses that
11 should have been reimbursed that were not.

12 Q. What type of treatment did he receive for which he
13 incurred these medical expenses?

14 A. He had a tree fall on him and he received a fractured
15 skull. I was told it was an injury similar to Jim Brady's,
16 the press secretary of Ronald Reagan's who was shot.

17 Q. And what particular treatment did Blue Cross and Blue
18 Shield deny coverage of?

19 A. There were a variety of inpatient hospital services.

20 Q. And do you recall the reasons that Blue Cross and Blue
21 Shield of Alabama gave for that decision?

22 A. My recollection is that they felt the facility where he
23 received treatment was not a hospital.

24 Q. What was it?

25 A. I thought it was a hospital.

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1 Q. You understood what their position was as to what kind of
2 facility it was? Was it appropriately licensed under the
3 law, for instance?

4 A. Essentially, it was a rehabilitative hospital. They --
5 this is going back a few years. But my recollection is that
6 since it didn't have an operating room they felt that it
7 wasn't a hospital.

8 Q. What was the nature of your testimony?

9 A. Policy interpretation.

10 Q. And did you offer testimony against Blue Cross and Blue
11 Shield of Alabama in that case against their position?

12 A. That's right.

13 Q. You concluded that in your view the policy covered these
14 disputed charges?

15 A. At least a significant portion of them.

16 Q. Is this an employer policy or an individual policy?

17 A. An employer policy.

18 Q. Did that employer policy differentiate based on smoking
19 status?

20 A. I don't know.

21 Q. Matter went to trial?

22 A. Yes. It did.

23 Q. And you testified at trial?

24 A. Yes.

25 Q. And what was the resolution of the case?

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- 1 A. Fry died during the trial so mistrial was declared.
2 Prior to the second trial they settled out of court.
3 Q. Do you have a copy of your deposition and court testimony
4 in that case?
5 A. No. I don't.
6 Q. Do you have a copy of either of that testimony?
7 A. No. I don't.
8 Q. Who retained you to serve as an expert witness on behalf
9 of Mr. Fry?
10 A. An attorney by the name of Dudley Perry.
11 Q. Dudley Perry?
12 A. Uh-huh.
13 Q. P-E-R-R-Y?
14 A. Yes.
15 Q. And where does Mr. Perry practice law?
16 A. Montgomery, Alabama.
17 Q. And at the time you were in Georgia?
18 A. That's correct.
19 Q. Do you recall who represented Blue Cross and Blue Shield
20 of Alabama?
21 A. I don't recall their names.
22 Q. Do you recall the courthouse where this trial occurred?
23 A. I recall the building.
24 Q. Was it a courthouse in Montgomery, Alabama?
25 A. Yes.

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1 Q. Was it a state court or a federal court?

2 A. I believe that it was state court.

3 Q. Prior to the Fry case, had you ever been retained as an
4 expert witness to testify against any other Blue Cross and
5 Blue Shield plan?

6 A. No.

7 Q. Since the Fry case and with the exception of this
8 litigation, have you ever been retained as an expert witness
9 to testify against any other Blue Cross and Blue Shield plan?

10 A. I don't believe so. But I have a story about this one.

11 Q. All right. Let me hear it?

12 MR. WILSON: What was that last comment?

13 THE WITNESS: I have story about this
14 one.

15 MR. WILSON: This one being what?

16 THE WITNESS: Some people feel that I was
17 retained, I don't feel that I was retained.

18 BY MS. RICHARD-NELSON:

19 Q. Let's try this again.

20 MR. WILSON: As long as it doesn't
21 involve something I said to you, I guess, it's fair game.

22 BY MS. RICHARD-NELSON:

23 Q. Do you have some question about whether you've been
24 retained in this litigation?

25 A. No. What I'm referring to is not this litigation.

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1 Q. There's another piece of litigation and there's some
2 question in your mind about whether you were retained as an
3 expert witness?

4 A. There's no question in my mind. I feel very strongly
5 about what happened.

6 Q. Why don't you tell me the story?

7 A. There was an attorney in Wisconsin who felt that his
8 client should have had a medical expense reimbursed by Blue
9 Cross and Blue Shield of Wisconsin. He asked me to review
10 some documents and agreed to pay me a fee, which is typically
11 what I do. I said I'll review the materials and if I can
12 support your position, then I'll be willing to be retained in
13 that matter. He sent the materials, but did not send a
14 retainer check. I reviewed the materials. Told him over the
15 phone that I didn't feel that he had a claim. That his
16 client had a claim against Blue Cross and Blue Shield. And
17 told him that I thought that he still owed me the money for
18 the time I spent reviewing the materials and I didn't hear
19 from him for a long time.

20 In the meantime, several months later an
21 attorney from Blue Cross and Blue Shield of Wisconsin
22 contacted me, not knowing that he had earlier contacted me,
23 because he never disclosed my name in the trial. Blue Cross
24 and Blue Shield found out about me by calling the school of
25 business. They asked me if I'd be willing to be an expert

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1 witness for them. So I said, Well, I don't have any problem
2 with that. I've reviewed the case and I feel that your point
3 is legitimate. At that point the other attorney named me in
4 the case and then he sent a retainer check to me which I
5 never cashed.

6 Q. So what happened?

7 A. The Blue Cross and Blue Shield attorneys never paid me
8 anything either. Nothing ever happened. The case was minor
9 and I don't know if they -- I believe that they settled it.
10 I believe that that was the resolution.

11 Q. Did you disclose to the Blue Cross and Blue Shield of
12 Wisconsin attorneys that you had been contacted by the
13 attorney on the other side of the case and had offered an
14 opinion to him earlier?

15 A. Yes.

16 Q. Okay. And on how many occasions has someone approached
17 you to review a situation in which a party wanted to bring an
18 action against a Blue Cross and Blue Shield plan for any
19 reason?

20 A. There was one additional time besides the one we've
21 talked about.

22 Q. When was that?

23 A. The past year or two.

24 Q. Okay. And which Blue Cross and Blue Shield plan did they
25 want to sue?

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1 A. Wisconsin.

2 Q. Did you agree to be retained by the plaintiff in that
3 case?

4 A. No.

5 Q. Now have we covered all instances in which you have been
6 approached to testify against Blue Cross and Blue Shield of
7 any state with the exception of this litigation?

8 A. Yes. I believe so.

9 Q. Have you been approached in the past to testify against
10 any traditional health care insurers?

11 MR. WILSON: Object to the form.

12 BY MS. RICHARD-NELSON:

13 Q. I'll rephrase it. Have you been approached in the past
14 to testify against any for-profit health care insurers?

15 (Whereupon, Reporter interruption.)

16 Q. Health care insurers.

17 A. Yes.

18 Q. On how many occasions?

19 A. I don't know.

20 Q. Has it been more than ten?

21 A. No.

22 Q. More than five?

23 A. I would guess between one and five.

24 Q. Have you ever agreed to consult with plaintiff's counsel
25 in an action against a for-profit health care insurer?

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1 A. I'm sorry. Could you say that one more time, please?

2 (Whereupon, Reporter read back.)

3 THE WITNESS: Yes.

4 BY MS. RICHARD-NELSON:

5 Q. Can you list those situations for me and give me some
6 detail on each?

7 A. Most of these -- some of them I probably can't recall --
8 were very minor. They would send me information and I, many
9 times, would tell them that I couldn't become involved at
10 that time. There was one earlier this summer that I'm
11 thinking of where an attorney in Reno, Nevada had a client
12 who felt he should have received or she should have received
13 coverage for certain medical conditions where they asked me
14 to review materials.

15 Q. Which health care insurer?

16 A. I believe the company was Pioneer Life.

17 Q. And Pioneer Life provided health care insurance to this
18 individual?

19 A. That's right.

20 Q. Anything else?

21 A. Not that come to mind right now.

22 Q. But you'd estimate between one and five times you've been
23 approached to review records in connection with an
24 individual's claim against a for-profit health care insurer?

25 A. (Nodding.)

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1 Q. Is that a yes?

2 A. Yes.

3 Q. Turning then to the testimony in the -- is it Chojnacki
4 case? Is that how you pronounce it?

5 A. I believe so.

6 Q. Can you describe for me the nature of your retention in
7 that case and the subject matter of the litigation?

8 A. The subject matter concerned a golden parachutes
9 provision.

10 Q. An employment policy?

11 A. Georgia-Pacific purchased Great Northern Nikosa (ph).

12 Prior to the purchase of Great Northern Nikosa, the
13 management put into place a policy that was intended to
14 protect employees.

15 Q. Is this a policy that has something to do with insurance?

16 A. Employee benefits. This was considered an employee
17 benefit.

18 Q. But did this policy pertain to compensation as well as
19 employee benefits? Golden parachutes I think of in terms of
20 a compensation package that one takes with them when they
21 leave the company?

22 A. Right.

23 Q. Is that what we're talking about here?

24 A. That's what we're talking about here.

25 Q. So that golden parachute would include money as well as

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1 benefits; is that correct?

2 A. Yes.

3 Q. And you testified on behalf of the plaintiff Mr.

4 Chojnacki in that case?

5 A. That's right.

6 Q. And what did you testify about?

7 A. I testified that I felt that he and others should have

8 received benefits under that policy that were denied by

9 Georgia-Pacific.

10 Q. Were these benefits health care benefits?

11 A. I believe they included health care benefits in addition

12 to other benefits.

13 Q. Did you also testify that he was entitled to a certain

14 amount of money under the provision of the policy for a

15 salary or compensation when he left the company?

16 MR. WILSON: Object to the form.

17 MS. RICHARD-NELSON: I'll rephrase it.

18 BY MS. RICHARD-NELSON:

19 Q. Did you testify on behalf of Mr. Chojnacki that he was

20 entitled to any compensation when he left the company?

21 A. My recollection is that I did.

22 Q. I see. Do you have a copy of that deposition?

23 A. I think that I do.

24 Q. I would ask you to hold on to that copy and not destroy

25 it and we'll probably be asking your counsel for it.

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1 Who is the lawyer who retained you to
2 represent Mr. Chojnacki?

3 A. There were two attorneys working together.

4 Q. And they were?

5 A. Robert Kay.

6 Q. K-A-Y?

7 A. Yes. And Randy Anderson.

8 Q. And where do they practice law?

9 A. Madison, Wisconsin.

10 Q. Was this a case venued in state court in Madison?

11 A. Federal court.

12 Q. Who provided health care insurance to Georgia-Pacific
13 Corporation?

14 A. I don't recall.

15 Q. Do you recall whether it was a Blue Cross plan?

16 A. I don't recall whether it was or not.

17 Q. Did the health care insurer change when Georgia-Pacific
18 bought out the other company you mentioned?

19 A. I don't know. That was not something that was central to
20 what I was doing.

21 Q. The health care benefits piece was not central to what
22 you were doing?

23 A. Who the carrier was.

24 Q. It didn't matter who the carrier was?

25 A. No.

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- 1 Q. How was that case resolved?
- 2 A. The last that I had heard it was on appeal.
- 3 Q. Was there a trial?
- 4 A. No. There was a summary judgement, I believe.
- 5 Q. I see. Against Mr. Chojnacki?
- 6 A. Yes.
- 7 Q. Okay. Let's take a look at your third piece of
- 8 testimony. Michael Augelli, Katherine Augelli and MCA Dairy
- 9 Farms, Inc. versus Liberty Mutual Fire Insurance Company,
- 10 Uglum Insurance Agency, and Employers Reinsurance
- 11 Corporation. Is that a fair reading of what it says there?
- 12 A. Yes. It is.
- 13 Q. You gave a deposition this year?
- 14 A. That's right.
- 15 Q. Have you given any trial testimony in that case?
- 16 A. No.
- 17 Q. Is that case scheduled to go to trial?
- 18 A. Yes. It is.
- 19 Q. When?
- 20 A. Late December.
- 21 Q. Were you retained on behalf of the plaintiffs in that
- 22 case?
- 23 A. Yes.
- 24 Q. What is the nature of the plaintiff's claim?
- 25 A. They feel that certain property damages they suffered

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1 should have been compensated.

2 Q. So, in this case, you're interpreting the provisions of a
3 property damage insurance policy?

4 A. That's right.

5 Q. And you concluded they should have received coverage?

6 A. Yes. The --

7 Q. Who retain -- Did you have something else to say?

8 A. Yes. I don't want to mischaracterize the nature of this
9 case. It also concerns bad faith, so there are claim
10 settlement issues involved as well.

11 Q. There is a claim being made by the plaintiffs that their
12 insurer ought to pay the full policy, is that what you're
13 saying?

14 A. Not the full, but certain losses that occurred should
15 have been paid. And, furthermore, the way in which the claim
16 was adjudicated by the insurer should have been done
17 differently.

18 Q. And are you supporting the bad faith claim against the
19 insurance companies in that litigation?

20 A. Yes. I am.

21 Q. Okay. Apart from your claim against Blue Cross and Blue
22 Shield plan, your testimony against the insurers in the
23 Augelli case, and the one to five times that you've been
24 retained to consider testifying against other for-profit
25 health care insurers, have we identified all of the various

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1 instances in which someone has approached you to testify
2 against an insurance company?

3 MR. WILSON: Can I have that question
4 back.

5 MS. RICHARD-NELSON: Sure.

6 (Whereupon, Reporter read back.)

7 MR. WILSON: Object to the form.

8 THE WITNESS: Excuse me.

9 BY MS. RICHARD-NELSON:

10 Q. You can answer the question?

11 A. There have been other cases which didn't involve health
12 insurers.

13 Q. But other types of insurers?

14 A. That's right.

15 Q. Okay. Why don't we list those. Let's start with how
16 many there have been. Have there been dozens, fewer than
17 ten? Give me some idea of the magnitude?

18 A. Fewer than ten.

19 Q. Can you recall those for me?

20 A. It would be very hard to because most of these were very
21 minor matters that I didn't spend say more than an hour or
22 two on. What I could provide, if it would be helpful, is I
23 could give you a list of case -- not cases. I'm not sure.

24 Q. You could give me a list of instances in which you've
25 been approached to consult with counsel against an insurance

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1 company?

2 A. I could try to construct that.

3 Q. Okay. Can you think of any of those instances, those
4 that you've just mentioned in which you were retained to
5 consult -- Actually, I'll withdraw that question. Any of
6 those instances in which you were asked to look at documents
7 in the hope that you would be retained against an insurance
8 company?

9 A. Could you repeat that?

10 Q. Let me try it again. Can you recall for me any instances
11 in which you were approached by counsel for a plaintiff
12 asking whether you would serve as an expert witness or
13 consult with counsel for the plaintiff against an insurance
14 company?

15 A. Can I recall any other cases?

16 Q. Yes. Any insurance company now? We're not just talking
17 about health.

18 A. Against an insurance company as opposed to --

19 Q. Yes.

20 A. -- for?

21 Q. Against an insurance company.

22 A. Yes.

23 Q. Okay. Would you recall them for me, please?

24 A. There was a case earlier this summer where, I believe
25 what happened, is the woman lost a piece of jewelry and there

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1 was a question as to whether it was covered by her insurance
2 policy or what the value of indemnification should be under
3 the policy.

4 Q. Anything else?

5 A. There was a case in Milwaukee where an individual's home
6 burned down -- or it was a rental property. There was
7 disagreement about the level of indemnification, in
8 particular, whether the property should have been indemnified
9 based on actual cash value or replacement cost.

10 Q. Anything else?

11 A. There was a case again earlier -- later in the summer
12 where an individual's gas station, I believe it was, burned
13 down. And, again, the question was whether the individual
14 should have received actual cash value or replacement cost
15 coverage based on whether they rebuilt the property or how
16 they were advised about the rebuilding of the property.

17 Q. Mr. Browne, have you agreed to consult in any of the
18 three cases you've just mentioned?

19 A. Yes.

20 Q. Which have you agreed to consult? Which cases?

21 A. All three.

22 Q. Okay. Any other cases in which you've been asked to look
23 at a claim against an insurer?

24 A. Not that I recall right now.

25 Q. So, you're currently consulting on the three cases you

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1 just mentioned; is that correct?

2 A. No.

3 Q. Have they been resolved?

4 A. Two of them resolved.

5 Q. Since the first of the year, what percentage of your time
6 would you say you devote to consulting as an expert witness?

7 A. Including this matter.

8 Q. Including this matter? Any matter? By consulting, I
9 mean anybody who approaches you to give them some advice one
10 way or another on a case?

11 A. Less than ten percent.

12 Q. Do you have a consulting practice as such that you've set
13 up?

14 A. How would you define a consulting practice?

15 Q. Where you are in the market as someone who counsel can
16 come to consult with you as an expert in litigation?

17 A. Yes.

18 Q. And do you market yourself?

19 A. Yes.

20 Q. How do you do that?

21 A. I've listed with TASA.

22 Q. And that is an organization with -- which lists expert
23 witnesses available for litigation?

24 A. That's right.

25 Q. Any other way in which you market yourself as an expert

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1 witness?

2 A. I have a classified ad in the Wisconsin Lawyer.

3 Q. What does that ad say?

4 A. It basically lists areas in which I'm -- or in which I

5 have expertise with some areas.

6 Q. Was that ad run in the most recent Wisconsin Lawyer?

7 A. It should have been.

8 Q. For how long have you run that ad in the Wisconsin

9 Lawyer?

10 A. I think two years.

11 Q. Any place else that you advertise your services as an

12 expert witness?

13 A. Recently I listed with a firm called IDEX.

14 Q. Could you spell that for me?

15 A. I believe it's I-D-E-X.

16 Q. And what is IDEX?

17 A. It's a firm which provides litigation support for

18 attorneys. My understanding is that they keep track of prior

19 court testimony.

20 Q. Any other advertising?

21 A. Word of mouth.

22 Q. Is it your goal to build your practice as an expert

23 witness?

24 A. Ideally, I would like to do nonlegal -- nonlegal

25 consulting.

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1 Q. But the advertising you're doing in the Wisconsin Lawyer
2 and with TASA and IDEX is all legal consulting?

3 A. That's right. That's hopefully short term.

4 Q. How long have you been listed with TASA?

5 A. Maybe five years.

6 Q. Okay. Have you now listed for me all prior testimony
7 that you have given at deposition, at legislative or
8 administrative hearings or at trial?

9 A. I believe that I have.

10 MS. RICHARD-NELSON: Why don't we take
11 five minutes.

12 (Recess taken.)

13 BY MS. RICHARD-NELSON:

14 Q. Mr. Browne, let's take a look, again, at what's been
15 marked as Defendants' Exhibit 4206. And if you look at
16 subparagraph E it says, A listing of all principal treatises,
17 articles, or documents relied upon by the expert in support
18 of his or her opinion. Do you see that?

19 A. Yes.

20 Q. In Exhibit 4207, following your signature, you list data
21 sources and then you list some documents; is that correct?

22 A. That's correct.

23 Q. For data you say, In reaching my opinions I have relied
24 on several data sources. These include the following, and
25 you've listed five data sources; is that correct?

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1 A. Yes.

2 Q. Mr. Browne, have you relied on any other data sources in
3 reaching your opinions in this case?

4 A. I don't believe so.

5 Q. Under documents you state, I've relied on a variety of
6 documents in reaching my opinions. The list below is
7 illustrative, not complete. Is that true?

8 A. Yes.

9 Q. So, you list 16 illustrative examples of documents that
10 you've relied upon in reaching your opinions; is that
11 correct?

12 A. That's correct.

13 Q. Did you have an understanding, Sir, that the court order
14 required you to provide a list of all documents that you
15 relied upon in reaching your opinion?

16 A. No. I thought this was appropriate.

17 Q. I see.

18 MS. RICHARD-NELSON: Counsel, there is an
19 agreement between the parties that experts will provide a
20 complete list of any documents relied upon in connection with
21 offering their opinions. That list need not include all
22 documents reviewed, but it must include a list of all
23 documents relied upon and an illustrative list does not
24 satisfy the court's order in this case. So I would ask that
25 immediately this list be amended to include all documents

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1 that you relied upon in reaching your opinions. And you may
2 consult with your counsel about that afterward, but I'm
3 making my record on this point.

4 This problem came up in one other expert deposition
5 and it is my intention to raise it at the next status
6 conference with the court which is in October. So if there
7 is any issue that we need to meet and confer about before
8 that, I'd appreciate it if you'd contact me.

9 MR. WILSON: Okay. For the record, it is
10 my understanding that the sum total of the disclosure that's
11 contained in what you've marked as Exhibit 4207, does contain
12 all the information that's required by the court's order.

13 MS. RICHARD-NELSON: Do you mean to tell
14 me that 4207 does contain an identity of all documents relied
15 upon in reaching the opinion, or do have a difference of
16 opinion on the court's order.

17 MR. WILSON: Oh, no. I don't have a
18 difference of opinion.

19 MS. RICHARD-NELSON: Okay. So what
20 you're telling me is that you believe that somewhere or
21 another in this document I will find the documents that Mr.
22 Browne relied upon in reaching his --

23 MR. WILSON: Yes. Either they are in
24 the section saying documents reviewed by Mark Browne, they
25 are specifically discussed in his opinion or they are listed

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1 at the end of his opinion. That's my understanding. Now
2 that would be subject to what Mr. Browne has to say.

3 MS. RICHARD-NELSON: If you would consult
4 with Mr. Browne so I can have a representation for the record
5 that document 4207, indeed, contains the identity of all
6 documents you relied upon in reaching your opinions, then we
7 have no problem.

8 MR. WILSON: Do you understand the
9 question?

10 THE WITNESS: Yes.

11 MR. WILSON: Then have I accurately
12 stated what the answer is?

13 THE WITNESS: Yes.

14 BY MS. RICHARD-NELSON:

15 Q. So, Mr. Browne, there are no documents that you have
16 reviewed and relied upon in reaching your opinions that I
17 cannot identify or find in document 4207?

18 A. I don't think so.

19 Q. Okay. A final requirement of the court's order is listed
20 under subparagraph little F. And it states, All notes,
21 handwritings, calculations or other documents of any kind or
22 nature existing at the time of the service of the expert's
23 signed report prepared in whole or in part for this matter by
24 the expert or by others at his request. Do you see that?

25 A. Yes.

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1 Q. Mr. Browne, did you work with anybody else in preparing
2 this report?

3 MR. WILSON: Object to the form.

4 BY MS. RICHARD-NELSON:

5 Q. You can answer that question yes or no?

6 A. Certainly I had discussions with counsel.

7 Q. Okay. Apart from your discussions with counsel, did you
8 retain the services of any research assistant or anybody else
9 to assist you in any way in preparing this report or doing
10 the research for this report?

11 A. I don't think so.

12 Q. Did you create notes in connection with reviewing
13 documents in preparation for this report?

14 A. Some.

15 Q. And where are those notes?

16 A. I have supplied all of my notes to counsel. Copies of
17 all of my notes.

18 Q. Did you have any handwritten notes?

19 A. Nothing in addition to what I've supplied to counsel.

20 Q. Have you supplied handwritten notes to counsel?

21 A. Yes.

22 MS. RICHARD-NELSON: Have you produced
23 handwritten notes?

24 MR. WILSON: Yes.

25 MS. RICHARD-NELSON: Do you have a copy

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1 of those here, 'cause I don't have them? I have a copy of
2 some computer --

3 MR. WILSON: There's -- well, can we go
4 off the record?

5 (Off the record.)

6 BY MS. RICHARD-NELSON:

7 Q. Mr. Browne, as I understand it, you turned over all your
8 handwritten notes in existence at the time of the service of
9 your signed report to your counsel; is that correct?

10 A. Yes.

11 Q. And over the lunch hour I'm going to go review the
12 production that counsel made to me to identify those
13 handwritten notes and we'll discuss that later. Okay?

14 A. Yes.

15 Q. Do you have any handwritten notes in your possession now
16 pertaining to this litigation that you have not turned over
17 to your counsel?

18 A. Only things like when my flight is.

19 Q. But nothing substantive?

20 A. That's correct.

21 Q. Do you have any other types of notes or documents in
22 connection with this litigation that you have not turned over
23 to counsel?

24 A. I've turned over everything to counsel that's of any
25 substantive nature.

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1 Q. Okay. At any time did you discard any notes?

2 A. I may have. They may have been things that I had copies
3 of. For instance, something that was in duplicate.

4 Q. Do you have a file that has the information in connection
5 with this litigation contained in that file? Do you have a
6 physical file for this litigation?

7 A. I have a bankers box full of documents and there are
8 several files that I have in it.

9 Q. Has everything in that bankers box been turned over to
10 counsel?

11 A. I believe so.

12 MR. WILSON: Except to the extent that it
13 came from me.

14 BY MS. RICHARD-NELSON:

15 Q. How many drafts of the report that we have identified as
16 being contained in Defendants' 4207 did you prepare?

17 A. I don't know the number.

18 Q. Can you give me an estimation?

19 A. Three or four.

20 Q. When were you first consulted by the tobacco industry in
21 connection with this litigation?

22 A. I was first contacted in early June.

23 Q. Of this year?

24 A. Yes.

25 Q. Early June 1997?

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- 1 A. Yes.
- 2 Q. And who contacted you?
- 3 A. Perry Wilson.
- 4 Q. And you understood that Mr. Wilson represented Philip
- 5 Morris; is that correct?
- 6 A. That's correct.
- 7 Q. What did he ask you to do?
- 8 A. Well, the first thing that he asked me to do was come up
- 9 to Minneapolis and talk to him about the case.
- 10 Q. Did you come to Minneapolis?
- 11 A. Yes.
- 12 Q. How many people were present at the meeting?
- 13 A. Just myself and Perry Wilson.
- 14 Q. No other lawyers from the Dorsey firm were there?
- 15 A. No.
- 16 Q. At any time have you met with counsel other than Mr.
- 17 Wilson in connection with this case?
- 18 A. No.
- 19 Q. Have you ever met with national counsel for Philip
- 20 Morris?
- 21 A. No.
- 22 Q. Have you ever met with counsel for any other tobacco
- 23 company?
- 24 A. Not in connection with this case and not that I know of.
- 25 Q. Have you ever met with counsel for any other tobacco

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1 company in connection with any other case?

2 A. Not that I am aware of.

3 Q. Have you ever previously been retained by the tobacco
4 industry to be an expert witness?

5 A. No.

6 Q. Have you had any involvement with the tobacco industry in
7 any connection prior to this litigation?

8 A. I bought some cigars once. That's -- do you mean in a
9 professional --

10 Q. In a professional capacity.

11 A. I'm sorry. No.

12 Q. How many times have you met with Mr. Wilson?

13 A. Today is the fourth time.

14 Q. Have you talked to him over the phone?

15 A. Yes.

16 Q. On how many occasions?

17 A. I don't know the number. Maybe eight or nine or ten
18 times.

19 Q. When did you complete the first draft of your report?

20 A. In late June.

21 Q. So it took you a couple of weeks to prepare it?

22 A. That's right.

23 Q. How did you gain access to the documents that have Bates
24 stamps on them that were produced in this case?

25 A. I was provided the documents by counsel.

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1 Q. How did you know what documents to ask for?

2 A. At our first meeting --

3 MR. WILSON: Well, Mr. Browne, let me
4 caution you to answer that question in a generic way. In
5 other words, don't -- you can discuss the mechanics of what
6 was done, but don't discuss the substance of our
7 conversation.

8 BY MS. RICHARD-NELSON:

9 Q. I'll break it down for you a little bit. Did you request
10 of counsel to obtain for you certain types of documents?

11 A. Counsel asked me if there were any types of documents.

12 Q. Okay. Mr. Browne, I don't want to have you disclose to
13 me what counsel told you?

14 A. Oh.

15 Q. Okay. I'm just trying to get at how it is that you came
16 upon this particular set of documents. If you can tell me
17 the mechanics or the logistics of that without disclosing the
18 conversations with counsel, I'd appreciate that. You were
19 aware, were you not, that there was a document depository
20 that had millions of pages of documents in this case; is that
21 right?

22 A. That's correct.

23 Q. And did you ask Mr. Wilson to obtain for you certain sets
24 of documents from that depository?

25 A. I didn't know what was in the depository.

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1 Q. Okay. Did Mr. Wilson provide you with any indices of
2 those documents?

3 A. No.

4 Q. Did Mr. Wilson provide you with documents?

5 A. Yes.

6 Q. Did you ask for any other documents besides the ones he
7 provided to you?

8 A. Not specifically.

9 Q. Did you go back and say, Gee, this area is missing or
10 that area is missing, or is there something on this subject
11 matter or did you just work with the set of documents that
12 Mr. Wilson gave you?

13 A. We're talking specifically about the documents in the
14 depository?

15 Q. Yes.

16 A. I'm sorry. Could you read that back.

17 (Whereupon, Reporter read back.)

18 THE WITNESS: That's several questions.

19 I never said that anything was missing that I recall.

20 BY MS. RICHARD-NELSON:

21 Q. Okay. Let's try it again. Mr. Wilson gave you a set of
22 documents; is that correct?

23 A. Yes.

24 Q. Had you requested those documents?

25 A. Some of them.

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1 Q. You had made a request for certain types of documents
2 from Mr. Wilson?

3 A. Yes.

4 Q. Okay. What documents did you request from Mr. Wilson?

5 A. I didn't request any particular documents.

6 Q. You requested subject matters?

7 A. Yes.

8 Q. What did you request?

9 A. I believe that I requested any depositions that would
10 pertain to areas that I was asked to examine.

11 Q. In that connection were you provided the deposition of
12 Richard Niemiec?

13 A. I don't recall that deposition.

14 Q. Were you provided the deposition of Mr. Green?

15 A. I don't recall that deposition.

16 Q. Apart from the deposition of Ms. Busse, were you given
17 any other depositions?

18 A. I believe that I was, but I don't recall them right now.
19 They would be listed in this report.

20 Q. Okay. And if they're not listed in the report, then you
21 were not provided them; is that correct?

22 A. That's true.

23 Q. Okay. Apart from depositions, what else did you request?

24 A. I believe that I asked for any reports that were -- would
25 pertain to issues I was asked to examine.

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1 Q. Okay. Anything else?

2 A. That's all that I can recall right now.

3 Q. Did you ask for all documents produced by Blue Cross on
4 the subject of differential premiums?

5 A. No.

6 Q. Did you ask for a copy of the report prepared by the
7 tobacco industry experts with respect to model on health care
8 damages?

9 A. No.

10 Q. Once the documents were provided to you, did you ask for
11 any other documents?

12 A. Not that I recall.

13 Q. When did you receive these documents?

14 A. Several days after I first met with counsel.

15 Q. So sometime in early June?

16 A. Yes.

17 Q. Do you know if it was the first or second week of June?

18 A. My guess is the second week.

19 Q. Okay. And your first draft was prepared by the last week
20 of June?

21 A. I think that's right.

22 Q. Did you review all of those documents before you prepared
23 that draft, Sir?

24 A. Yes.

25 Q. How many hours did you spend in those two weeks reviewing

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1 documents and preparing your first draft?

2 A. I've put in --

3 Q. Of those two weeks. The two weeks. From the second week
4 in June when you first got the documents until the time that
5 your first draft was prepared, how many hours did you spend
6 on the project?

7 A. So from my first meeting --

8 Q. No. From the time you got the documents to the time you
9 prepared your first draft, how many hours did you spend?

10 A. I would estimate in the neighborhood of 90.

11 Q. In two week's time?

12 A. Yes.

13 Q. Okay. And then you showed your first draft to counsel?

14 A. Yes.

15 Q. Did counsel make any changes, yes or no? I don't want to
16 know the substance of the changes. I just want to know if
17 counsel made changes to your first draft, or suggestions?

18 A. Suggestions.

19 Q. Okay. How many suggestions? Again, without disclosing
20 the substance, how many suggestions did counsel make to your
21 first draft?

22 A. I would say three or four.

23 Q. Okay. And did you incorporate those changes?

24 A. Yes.

25 Q. And when did you produce your second draft?

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- 1 A. I would say within a couple of days of the first draft.
- 2 Q. And did you show that second draft to counsel?
- 3 A. Yes.
- 4 Q. And did counsel make any suggestions, yes or no, to that
- 5 second draft?
- 6 A. Yes.
- 7 Q. How many?
- 8 A. I would say three to four again, to guess a number.
- 9 Q. And did you incorporate those changes?
- 10 A. Yes.
- 11 Q. Did you prepare a third draft?
- 12 A. I don't recall how many drafts there were, but I may well
- 13 have.
- 14 Q. Okay. I think you originally testified three to four; is
- 15 that correct?
- 16 A. That is correct.
- 17 Q. Do you recall whether counsel made suggestions to the
- 18 third draft?
- 19 A. Yes.
- 20 Q. How many?
- 21 A. Again, I have to guess. And, again, I would guess three
- 22 to four.
- 23 Q. And did you incorporate those suggestions?
- 24 A. Yes.
- 25 Q. And do you recall now whether there was a fourth draft or

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1 whether you created the final draft based on the third draft?

2 A. I don't recall how many drafts there were. There may
3 have been a fourth.

4 Q. When did you complete your final draft?

5 A. The very end of June is my recollection. For some reason
6 June 29 comes to mind.

7 MS. RICHARD-NELSON: Is there a date on
8 this report, Mr. Wilson?

9 MR. WILSON: No. There's not.

10 BY MS. RICHARD-NELSON:

11 Q. Approximately June 29?

12 A. Yes.

13 Q. So between the first week in June and June 29, you
14 reviewed all of the documents identified in Exhibit 4207 and
15 prepared at least three drafts and a final draft of the
16 report; is that correct?

17 A. That's correct.

18 Q. At any time since June 29, have you requested any
19 deposition testimony or documents which might be relevant to
20 the subject matter of your report?

21 A. Yes.

22 Q. And have you received any?

23 A. I'm requesting a deposition that is being taken right now
24 in addition to this one.

25 Q. Which deposition is that?

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1 A. Kip Viscusi's.

2 Q. And that is an expert retained by the tobacco industry in
3 this case?

4 A. That's my understanding.

5 Q. Any other depositions that you've requested?

6 A. No.

7 Q. Have you requested any depositions of personnel at Blue
8 Cross and Blue Shield in Minnesota who might have testified
9 on the subject of differential premiums and group health
10 policies?

11 A. No. I didn't.

12 Q. Did you request the depositions of any state employees
13 who might have addressed that issue for the state of
14 Minnesota?

15 A. Can I ask a clarification?

16 Q. Sure.

17 A. We're talking about the time period after the report.

18 Q. Yes. Because my understanding is that if you had
19 requested it before June 29, it would be identified in
20 Exhibit 4207; is that correct?

21 A. That's correct. That's my understanding also.

22 Q. Okay. So now what I want to know is after that time, did
23 you request the testimony of -- and I'll start over -- any
24 Blue Cross and Blue Shield of Minnesota employee who may have
25 been deposed on this subject?

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1 A. I didn't.

2 Q. Any state employee who may have been deposed on this
3 subject?

4 A. No. I didn't.

5 Q. Any expert witness apart from Mr. Viscusi who may have
6 offered an opinion on this subject?

7 A. No.

8 Q. As we sit here today, the only deposition you intend to
9 request is that of Mr. Viscusi?

10 A. And my own.

11 Q. And your own?

12 A. Yes.

13 Q. Mr. Browne, does your curriculum vitae accurately
14 describe your educational background?

15 A. I believe that it does.

16 Q. And your employment background?

17 A. Not completely.

18 Q. Have you ever been employed by a Blue Cross plan?

19 A. No. I haven't.

20 Q. Have you ever been employed by a for-profit health care
21 insurer?

22 A. No.

23 Q. Have you ever been employed by a health maintenance
24 organization?

25 A. No.

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1 Q. Would you describe for me the nature of any employment
2 you may have had subsequent to graduating from --

3 (Reporter interruption.)

4 Q. Subsequent to having graduated from the Wharton School in
5 1981, apart from the academic experience which appears on
6 your CV?

7 A. The CV contains my complete employment history since the
8 time I received my dissertation.

9 Q. I guess, that's not my question. You graduated from the
10 Wharton School in 1981; is that correct?

11 A. Yes.

12 Q. Okay. What did you do upon graduation from Wharton
13 School?

14 A. I worked for the Progressive Insurance Company.

15 Q. And where did you work for the Progressive Insurance
16 Company?

17 A. In Mayfield Heights, Ohio.

18 Q. How long did you work for the Progressive Insurance
19 Company?

20 A. About a year-and-a-quarter.

21 Q. What was your job?

22 A. I was an actuary.

23 Q. And what did you do?

24 A. I produced reports on what we should charge different
25 risks based on their underwriting characteristics.

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- 1 Q. Is this health care insurance?
- 2 A. No. This was automobile insurance.
- 3 Q. Exclusively automobile insurance?
- 4 A. Progressive also sold motorcycle insurance, recreational
- 5 vehicle insurance, several other lines.
- 6 Q. Okay. What different risks did you identify which should
- 7 differentiate charges for automobile insurance?
- 8 A. One thing that I looked at was the effect of motor
- 9 vehicle moving violations on risk.
- 10 Q. Anything else?
- 11 A. I'm sure there were others, but I don't recall them right
- 12 now.
- 13 Q. Did you study drinking while intoxicated?
- 14 A. That would have come up under the one that I just
- 15 mentioned. If the person was found guilty of drinking or
- 16 driving under the influence, then they would have received a
- 17 violation.
- 18 Q. Now, you say you were an actuary at Progressive Insurance
- 19 Company, but you've never been licensed as an actuary; is
- 20 that correct?
- 21 A. That's right.
- 22 Q. You've never taken any of your actuarial exams?
- 23 A. That's right.
- 24 Q. And you don't belong to any actuarial societies; is that
- 25 correct?

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1 A. That's fair. The department that I belong to within the
2 school of business is the Actuarial Science Risk Management
3 and Insurance Department.

4 Q. Yes. But you don't personally belong to any actuarial
5 societies?

6 A. That's right.

7 Q. What did you do when you left Progressive Insurance
8 Company?

9 A. I became involved with a start-up software company.

10 Q. Did you leave Progressive voluntarily?

11 A. Yes.

12 Q. What was the name of the start-up software?

13 A. I don't remember what we called ourselves.

14 Q. How long did you work for them?

15 A. About three months.

16 Q. What did you do then?

17 A. Then I began my graduate studies.

18 Q. Did you work during the time that you were receiving your
19 master's degree at the Wharton School?

20 A. No.

21 Q. You didn't work at all?

22 A. I wasn't allowed to by the provisions of my fellowship.

23 Q. Good deal. After you received your master's degree in
24 1986, did you seek employment?

25 A. I did have a summer internship one year. It may have

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1 been before my master's or after my master's.

2 Q. And where was that?

3 A. It was with Security Life of Denver.

4 Q. What did you do for them?

5 A. I worked in the actuarial department.

6 Q. What did you do?

7 A. Not much.

8 MR. WILSON: Where do you get these
9 jobs?

10 BY MS. RICHARD-NELSON:

11 Q. When you were working for them, what did you do?

12 A. Should I give a little background?

13 Q. Sure.

14 A. They helped fund my fellowship. They are one of many
15 life insurance companies that contribute to the Huebner
16 Foundation which provides fellowships. The faculty liaison
17 with the Huebner Foundation encouraged us to work a summer
18 internship for one of these companies, and so I did.

19 Q. Did you do some work in the life insurance area while you
20 were there?

21 A. I imagine that I did, but my responsibilities really were
22 minimal.

23 Q. Did you do any health-related insurance work?

24 A. Not that I recall.

25 Q. Apart from the year-and-a-half of Progressive Insurance

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1 Company, three months at the start-up software company, and
2 your summer internship at Security Life, have you ever had
3 any other employment subsequent to graduating from college
4 apart from your academic experience?

5 A. Not employment. But I have done consulting.

6 Q. Okay. What kind of consulting have you done?

7 A. I've consulted with a number of different companies on
8 insurance matters.

9 Q. Have you ever consulted with a Blue Cross and Blue Shield
10 plan on insurance matters?

11 A. No.

12 Q. Have you ever consulted with a for-profit health care
13 insurance company on insurance matters?

14 A. Would you consider workers' compensation health
15 insurance?

16 Q. Let's consider that to be distinct for now. Let's talk
17 about health care insurance?

18 A. Okay. No.

19 Q. Have you ever consulted with an HMO?

20 A. No.

21 Q. You've consulted, apparently, with a workers' comp
22 carrier?

23 A. That was one of their products.

24 Q. Okay. Which carrier was that?

25 A. General Casualty.

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1 Q. And what kind of consulting work did you do for them?

2 A. I provided reports to them about the progress of the
3 Clinton health care reform and I studied how it might impact
4 their product line.

5 Q. And their product line included casualty insurance?

6 A. Workers' compensation insurance, is what they were
7 concerned about.

8 Q. Primarily workers' comp?

9 A. That was their primary interest. Their other products
10 lines are important also.

11 Q. But their concern with you was to determine the extent to
12 which the Clinton health care reform that was proposed would
13 impact their workers' comp line of business?

14 A. That's correct.

15 Q. How long did you consult?

16 A. Maybe a year-and-a-half.

17 Q. Did you reach any conclusions about the impact of
18 Clinton's health care reform proposal on their workers' comp
19 insurance business?

20 A. We felt that there would be profound implications.

21 Q. Negative implications?

22 A. Potentially.

23 Q. Have you ever been involved in any way with the Minnesota
24 Care legislation of the early 1990s in the state of
25 Minnesota?

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1 A. No.

2 Q. Have you ever consulted in any way with anyone on the
3 subject of integrated service networks?

4 A. No.

5 Q. I meant to ask you before. Under your Conference Papers
6 and Presentations you list: The effects of the Coinsurance
7 and Deductible Provisions on Pooling in an Insurance Market
8 with Adverse Selection. Do you see that?

9 A. Yes.

10 Q. Have you done consulting on the issues of coinsurance
11 before?

12 A. No.

13 Q. What was the gist of your paper with regard to the
14 effects of the coinsurance and deductible provisions on
15 pooling in the insurance market with adverse selection?

16 A. That paper overtime grew into one of the papers that you
17 asked me about earlier today that counsel provided to you at
18 the start of the meeting.

19 Q. Which paper is that?

20 A. The one with Virginia Young.

21 Q. Okay. What conclusions did you reach about the effect of
22 coinsurance on pooling in an insurance market with adverse
23 selection?

24 A. I demonstrated that changes in coinsurance can be used to
25 affect different risk types differently when they're pooling.

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1 Q. Have you had any involvement as a consultant in any way
2 with issues pertaining to the method of calculating
3 coinsurance by the Blue Cross and Blue Shield plans in this
4 country?

5 A. No. I haven't.

6 Q. Have you consulted with any other -- have you consulted
7 with any for-profit health care insurer on issues pertaining
8 to coinsurance?

9 A. No.

10 Q. Okay. Apart from your year-and-a-half of consulting with
11 General Casualty on the impact of the Clinton health care
12 reform on workers' comp, what other consulting have you done?

13 A. I've advised a number of companies or organizations on
14 their pension plans.

15 Q. What kind of an advice do you give on pension plans?

16 A. One company, the Wisconsin Dairy Herd Improvement Co-op
17 merged with another company. Each of the companies prior to
18 the merger had its own pension plan. They approached me and
19 asked me to evaluate which of the two pension plans should be
20 the one that covers the employees in the combined
21 organization, or to determine if they should continue with
22 their separate pensions plans, or to determine if a new one
23 should be created and the other two phased out.

24 Q. Have you consulted with any other employer organizations
25 on the subject of their health care insurance?

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1 A. I don't think so.

2 Q. Would you agree with me, then, that you have never been
3 employed by a Blue Cross and Blue Shield plan in the capacity
4 of conducting underwriting?

5 A. Yes.

6 Q. And would you agree with me that you've never conducted
7 underwriting for any kind of a health carrier?

8 A. Yes.

9 Q. And would you agree with me that you have never served
10 with a health carrier in any actuarial capacity?

11 A. Yes.

12 Q. Would you agree with me that you've never been a party to
13 negotiations between an employer and its union with respect
14 to the negotiation of health care benefits?

15 A. Yes.

16 Q. Would you agree with me that you've never consulted with
17 an employer in designing or fashioning its health care
18 benefits?

19 A. Can I have that question back?

20 (Whereupon, Reporter read back.)

21 THE WITNESS: No.

22 BY MS. RICHARD-NELSON:

23 Q. You've never assisted an employer in creating a proposal
24 of health care benefits it wishes to obtain from a health
25 carrier?

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1 A. I have been involved in that capacity.

2 Q. Okay. And what capacity have you been involved in
3 assisting an employer in designing the health care benefits
4 it wishes to obtain from a health carrier?

5 A. With the student health insurance plan at the University
6 of Wisconsin Madison.

7 Q. Okay. As I understand it, you have worked on student
8 health insurance since 1993 at the University of Wisconsin
9 Madison; is that correct?

10 A. If that's the date on this CV, then that is correct. I
11 don't see it right now.

12 Q. On the CV it says in 1993, you were involved in the
13 foreign graduate student health insurance committee at the
14 University of Wisconsin?

15 A. Yes.

16 Q. What did you do on that committee?

17 A. The committee was responsible for choosing a health
18 insurance carrier.

19 Q. For foreign graduate students?

20 A. Yes. It was mandatory for the foreign graduate students
21 and it was voluntary for the domestic graduate students.

22 Q. And you assisted these foreign graduate students in
23 selecting which carrier to go with?

24 A. Yes. Actually, I was part of a committee that was made
25 up of employees of the university.

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- 1 Q. And which carrier did you select?
- 2 A. We selected Physicians Plus.
- 3 Q. Was that an HMO?
- 4 A. Yes. It is.
- 5 Q. When you approached Physicians Plus, did you have in mind
- 6 a set of benefits that you sought from them?
- 7 A. Yes.
- 8 Q. Did you request of Physicians Plus the implementation of
- 9 a differential premiums based on smoking?
- 10 A. Not on smoking.
- 11 Q. On some other risk?
- 12 A. Yes.
- 13 Q. Which risk?
- 14 A. Family composition. And also whether the student was
- 15 foreign student or a domestic student.
- 16 Q. Okay. As I understand it, there was a different premium
- 17 rate if you wanted to cover your children as well; is that
- 18 correct?
- 19 A. That's correct.
- 20 Q. And there was a different premium rate if you were a
- 21 foreign student versus domestic student?
- 22 A. That's correct.
- 23 Q. But there were no different premium rates based on risky
- 24 behaviors?
- 25 A. That's correct.

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1 Q. And this was in 1993?

2 A. And each year subsequent.

3 Q. Does the union play any role in developing student health
4 insurance at the University of Wisconsin Madison?

5 A. There is a union of teaching assistants. One of the
6 people on the committee may have represented that union. I
7 honestly don't know.

8 Q. Do you recall at any time before approaching Physicians
9 Plus any discussion at the University of Wisconsin pertaining
10 to the implementation of a differential premium in the
11 foreign graduate student health insurance policy based on
12 smoking?

13 A. No. I don't recall any discussion.

14 Q. Do you recall Physicians Plus asking you whether you were
15 interested in that provision?

16 A. No. I don't recall that.

17 Q. Then in 1994, it says that you were on the student health
18 insurance plan committee at the University of Wisconsin; is
19 that accurate?

20 A. Same committee, yes.

21 Q. That's the same committee as the 1993 committee?

22 A. Yes.

23 Q. So that committee addressed both foreign and domestic
24 students; is that correct?

25 A. Yes.

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1 Q. In 1993, did you obtain your insurance -- your health
2 insurance as a university employee?

3 A. Yes.

4 Q. Did you have options as to where you might go for your
5 health insurance as an employee?

6 A. Yes.

7 Q. And were those options developed as a result of
8 negotiations with the union?

9 A. I was not a party to that. I don't know.

10 Q. Okay. What option had you selected in 1993 with respect
11 to your personal health care insurance?

12 A. Are you asking me who my carrier was?

13 Q. Yes. As a university employee, yes.

14 A. It's a company that is currently known as Unity.

15 Q. How many options did you have?

16 A. I don't know.

17 Q. Was Blue Cross and Blue Shield of Wisconsin an option?

18 A. I suspect it was.

19 Q. And you did not choose to be covered by them; is that
20 correct?

21 A. That's right.

22 Q. When you were covered by Unity in 1993, was there a
23 differential premium charged to those university employees
24 who smoked versus those who didn't with Unity?

25 A. I don't think so.

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1 Q. Are you aware of any differential premium based on
2 smoking implemented in any of the plans which were options to
3 university employees in 1993?

4 A. I'm not aware of any.

5 Q. Are you aware of any discussion at the university about
6 implementing such a differential premium in its -- the plan
7 for its employees?

8 A. No. I'm not aware of any discussions.

9 Q. Is that true of 1994 to the present as well?

10 MR. WILSON: Object to the form.

11 BY MS. RICHARD-NELSON:

12 Q. Yeah. We'll go through each step. In 1994 --

13 MR. WILSON: You know, Counsel, I don't
14 mean to tell you how to do this, but you could load it all up
15 on one question. You don't have to run through.

16 MS. RICHARD-NELSON: That's okay. I
17 don't mind.

18 BY MS. RICHARD-NELSON:

19 Q. In 1994, which health carrier did you select on the
20 student health insurance plan committee for domestic and
21 foreign graduate students?

22 A. Physician Plus.

23 Q. Again, did Physicians Plus have any differential premium
24 based on smoking for the student health committee? The
25 student committee?

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1 A. No.

2 Q. No?

3 A. No.

4 Q. What carrier did you opt for in 1994 as a university of
5 Wisconsin employee?

6 A. The company is currently called Unity. It was called
7 U-Care at some point in the past. I'm not sure what year it
8 changed.

9 Q. So you stayed with the same company that you had in 1993?

10 A. Yes.

11 Q. And in 1994, was there a differential premium based on
12 smoking implemented in the University of Wisconsin employee
13 population?

14 A. One more time.

15 Q. I'll ask it another way. In 1994, are you aware of any
16 differential premium based on smoking implemented in any of
17 the health care options available to the University of
18 Wisconsin employees?

19 A. I'm not aware of any.

20 Q. Were you aware of any discussion at the University of
21 Wisconsin addressing the issue of implementing such a premium
22 in the policies available to employees of the University of
23 Wisconsin?

24 A. I'm not aware of any discussion.

25 Q. In 1995, you served on the student health insurance

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1 program committee as well; is that correct?

2 A. Yes.

3 Q. What carrier did you opt for in 1995 for the students?

4 A. Physicians Plus.

5 Q. In 1995, was there a differential premium based on
6 smoking implemented in the student policies?

7 A. No.

8 Q. In 1995, were you aware of any differential premium based
9 on smoking implemented in any of the health care policies
10 which were options to University of Wisconsin employees?

11 A. I'm not aware of any.

12 Q. Were you aware of any discussions at the University of
13 Wisconsin about implementing such a differential?

14 A. I'm not aware of any discussions.

15 Q. Okay. In 1996, you were a member of the student health
16 insurance committee; is that correct?

17 A. That's correct.

18 Q. What carrier did you opt for 1996?

19 A. Physicians Plus.

20 Q. In 1996, did Physicians Plus have a differential premium
21 based upon smoking for the students at the University of
22 Wisconsin?

23 A. No.

24 Q. In 1996, are you aware of any differential premium based
25 on smoking implemented in any of the policies provided to

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1 University of Wisconsin employees' health care policies?

2 A. I'm not aware of any.

3 Q. Are you aware of any differential premiums implemented in
4 any of the life insurance policies available to University of
5 Wisconsin employees at any time that you were there?

6 A. I'm not aware of any.

7 Q. Have you ever worked for or consulted with a health
8 carrier who implemented differential premiums based on
9 smoking in employer group policies?

10 A. Not that I am aware of.

11 Q. And apart from your work on the student health insurance
12 plan committee at the University of Wisconsin, would you
13 agree with me that you have never been employed or you've
14 never consulted with an employer for the purpose of designing
15 a health care policy for that group?

16 A. I would agree with that.

17 Q. Would you agree with me that you're not an expert in the
18 subject of the health hazards of the cigarette smoking?

19 A. I am not an expert in that area.

20 Q. Are you an expert in the subject of the addictive nature
21 of nicotine?

22 A. No. I'm not.

23 Q. Would you agree with me that you've never been employed
24 by a state or federal regulatory agency which regulates any
25 Blue Cross plan around the country?

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1 A. I don't think I have been.

2 Q. Would you agree with me that you've never been called
3 upon, therefore, to render any actuarial opinions about a
4 differential premium?

5 A. I'd agree with that.

6 Q. Have you ever personally had a contract for health care
7 insurance with a Blue Cross plan?

8 A. Yes.

9 Q. When?

10 A. When I was at the University of Georgia.

11 Q. Was that the Blue Cross and Blue Shield of Georgia plan?

12 A. Yes.

13 Q. You were on the faculty at the University of Georgia?

14 A. Yes.

15 Q. And on the faculty and as an employee, did you have an
16 option of a variety of health care plans?

17 A. No.

18 Q. When you were on the faculty of the University of
19 Georgia, was there a differential premium based on smoking
20 implemented in that group plan for employees at the
21 University of Georgia?

22 A. Not that I recall.

23 Q. Do you recall any discussions about requesting the
24 implementation for your employer group?

25 A. No. I don't recall any discussions.

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1 Q. How long were you covered by the Blue Cross and Blue
2 Shield plan of Georgia?

3 A. I believe that I was covered from January of 1988 through
4 August of 1993.

5 Q. For approximately five years?

6 A. Yes.

7 Q. Did you ever make any complaint regarding the timeliness
8 of a payment by Blue Cross and Blue Shield of Georgia?

9 A. Not that I recall.

10 Q. Did you ever make a complaint about any coverage issue?

11 A. Not that I recall.

12 Q. Did you ever request that there be a differential premium
13 based on smoking in that policy?

14 A. No.

15 Q. There were individuals employed by University of Georgia
16 who smoked, however, were there?

17 A. I assume.

18 MS. RICHARD-NELSON: Should we take a
19 couple minutes.

20 (Recess was taken.)

21 BY MS. RICHARD-NELSON:

22 Q. Mr. Browne, have you ever smoked cigarettes?

23 A. No.

24 Q. Do you believe that smoking is hazardous to your health?

25 A. I don't have an expert opinion on that.

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1 Q. I'm not asking for an expert opinion. I'm asking you as
2 a citizen of the state of Wisconsin, do you believe it's
3 hazardous to your health?

4 A. I know only what I've read in the newspapers. What the
5 attorney general says.

6 Q. Do you think that cigarettes cause disease?

7 A. I think that they probably contribute to sickness.

8 Q. Do you have an opinion as to whether they cause disease?

9 A. Not an expert opinion.

10 Q. I'm not asking you as an expert. I'm wondering as a
11 citizen of the state of Wisconsin whether you believe there's
12 a causal link between cigarettes and disease?

13 MR. WILSON: Object to the form.

14 THE WITNESS: What do you mean by a
15 causal link?

16 BY MS. RICHARD-NELSON:

17 Q. That smoking cigarettes has a causative relationship with
18 getting certain diseases like certain cancers, heart disease
19 emphysema?

20 MR. WILSON: Object to the form.

21 THE WITNESS: I think that it does for
22 some people.

23 BY MR. STPHAO:

24 Q. In some people cigarettes cause disease?

25 MR. WILSON: Object to the form.

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1 THE WITNESS: Is that what you're
2 asking?

3 BY MS. RICHARD-NELSON:

4 Q. I'm trying to understand what you're saying. You said
5 for some people, do you recall that?

6 A. Yes.

7 Q. So I'm asking whether what you said is that for some
8 people cigarettes cause disease?

9 MR. WILSON: Object to the form.

10 THE WITNESS: I think that there's a
11 variety of different factors that for some people that's a
12 contributing factor.

13 BY MS. RICHARD-NELSON:

14 Q. Do you think it's reasonable for a person to believe that
15 there's some uncertainty about whether there's a causal link
16 between cigarette smoking and disease?

17 MR. WILSON: Object to the form.

18 THE WITNESS: Could you rephrase the
19 question?

20 MS. RICHARD-NELSON: Why don't you read
21 it.

22 (Whereupon, Reporter read back.)

23 MR. WILSON: Object to the form.

24 THE WITNESS: I guess. I really don't
25 know how to answer that. I guess that people disagree about

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1 that.

2 BY MS. RICHARD-NELSON:

3 Q. Do you think they disagree in good faith?

4 MR. WILSON: Object to the form.

5 THE WITNESS: I don't know.

6 BY MS. RICHARD-NELSON:

7 Q. What diseases are you aware of that are caused by smoking
8 in some people?

9 MR. WILSON: Object to the form.

10 THE WITNESS: I only know what I've read
11 in the papers about cigarette smoking.

12 BY MS. RICHARD-NELSON:

13 Q. What have you read in the papers?

14 A. Well, I've read that many people think that it
15 contributes to lung disease.

16 Q. Any other diseases?

17 A. I think that I've read somewhere that it's linked to
18 other diseases. I don't know. Heart disease.

19 Q. Okay.

20 A. Which, I guess, I think of as together.

21 Q. Anything else?

22 A. Not that I can think of.

23 Q. Do you believe that nicotine is addictive?

24 MR. WILSON: Object to the form.

25 THE WITNESS: What do you mean by

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1 addictive?

2 BY MS. RICHARD-NELSON:

3 Q. Do you believe that there's a physiological addiction to
4 nicotine?

5 MR. WILSON: Object to the form.

6 THE WITNESS: Again, I don't have any
7 professional or expert opinion about that. That's not
8 something I've ever read any medical journals about or
9 anything.

10 BY MS. RICHARD-NELSON:

11 Q. Do you think that there's a good faith -- there can be a
12 good faith controversy as to whether nicotine is addictive or
13 not?

14 MR. WILSON: Object to the form.

15 THE WITNESS: Yeah. I think people could
16 disagree about that.

17 BY MS. RICHARD-NELSON:

18 Q. Have you ever read any tobacco industry documents
19 regarding the health effects of cigarette smoking?

20 A. Nothing that I know of besides what we've gone over
21 earlier. I don't know if you consider any of those materials
22 to be tobacco industry documents.

23 Q. Do you know whether you were provided any documents
24 produced by the tobacco industry in this case?

25 A. No. I don't know.

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1 Q. You understand that the state of Minnesota and Blue Cross
2 and Blue Shield have brought a lawsuit against the domestic
3 cigarette industry as well as some foreign cigarette
4 manufacturers; is that correct?

5 A. Yes.

6 Q. And do you understand that the state of Minnesota is
7 seeking money damages in connection with that litigation?

8 A. Yes.

9 Q. Do you understand that those money damages are the
10 smoking attributable health care costs of certain state
11 programs?

12 A. That's my understanding.

13 Q. Okay. And is it your understanding that those state
14 programs are the Medicaid program and the General Assistance
15 Medical Care Program?

16 A. That those are included?

17 Q. That those are the two state programs for which the state
18 of Minnesota is seeking damages in this litigation?

19 A. I thought there were additional programs also.

20 Q. Okay. So what other additional programs do you believe
21 the state of Minnesota is seeking damages for in this case?

22 A. Their health insurance program for state employees.

23 Q. You read the expert report of Messrs. Zeger, Wyant and
24 Miller, did you not?

25 A. Yes.

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1 Q. And I can represent to you, then, if didn't understand it
2 from that report, that as of today, the state of Minnesota is
3 seeking tobacco attributable health care costs from its
4 Medicaid program and its General Assistance Medical Care
5 Program and that's it?

6 A. Okay. What is the General Assistance program, if you
7 don't mind me asking?

8 Q. Sure. It's a welfare program that is strictly state
9 based as opposed to Medicaid which has a federal component to
10 it?

11 A. Okay.

12 Q. It has differing eligibility requirements and the like?

13 A. Okay.

14 Q. Now, for the Medicaid program and the General Assistance
15 Medical Care program, would you agree with me that there are
16 no premiums charged to individuals to obtain health care
17 under those programs?

18 MR. WILSON: Object to the form.

19 THE WITNESS: I wasn't asked to examine
20 the Medicaid program or the General Assistance program, so I
21 am not familiar with what the provisions of those plans are.

22 BY MS. RICHARD-NELSON:

23 Q. Okay. So you're not offering any opinions with respect
24 to the state's claim for tobacco attributable health care
25 costs under Medicaid; is that correct?

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1 A. I don't know what the provisions of the Medicaid program
2 are.

3 Q. I think you can safely assume that a Medicaid recipient
4 does not pay a premium. So if that's the case, I have
5 assumed and I don't see anything other than in your report to
6 tell me otherwise, that you are not offering any opinions in
7 this litigation pertaining to the state's claim for tobacco
8 attributable health care costs from the Medicaid program?

9 MR. WILSON: Object to the form.

10 THE WITNESS: If the state participants
11 in these programs aren't making any contribution, then I
12 would agree with that statement.

13 BY MS. RICHARD-NELSON:

14 Q. Okay. And there are no contributions in Medicaid or
15 General Assistance medical care?

16 A. I'll accept that.

17 Q. Now, in the complaint there were -- there was a claim for
18 damages under the state employer group insurance program on
19 behalf of the state of Minnesota, but that claim has been
20 dropped and that is disclosed to you in the report of Messrs.
21 Zeger, Wyant and Miller. That claim has been dropped for the
22 state of Minnesota?

23 A. Okay.

24 MR. WILSON: Object to the form.

25 BY MS. RICHARD-NELSON:

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1 Q. Now, the Minnesota Care program is also mentioned in the
2 complaint and there is a sliding scale of differential
3 premiums for that program. Are you aware of that?

4 A. I may have seen something about that. I don't recall
5 right now.

6 Q. So, you don't have any information about the type of
7 premium or contribution from Minnesota Care recipients; is
8 that correct?

9 A. Not that I recall right now.

10 Q. Minnesota Care is no longer in the model either as is
11 disclosed in the report of Mr. Zegar, Wyant and Miller. So
12 is it fair for me to understand that if the Medicaid program
13 and the General Assistance medical programs are the only
14 state programs under which the state of Minnesota is seeking
15 damages in this case, you will not be offering any opinions
16 with regard to those damages?

17 MR. WILSON: Object to the form.

18 MS. RICHARD-NELSON: If you want to
19 consult with your counsel for a moment, you may. I don't
20 want to trip you up here. There seems to be a lack of
21 understanding in your report and that's why I want to clarify
22 it for the record.

23 MR. WILSON: Do you want to consult?

24 MS. RICHARD-NELSON: If not, then I'll
25 ask you to answer the question.

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1 THE WITNESS: Can I have the question
2 back.

3 (Whereupon, Reporter read back.)

4 BY MS. RICHARD-NELSON:

5 Q. Please answer?

6 A. I don't see how my opinions would come into play in those
7 areas.

8 Q. Okay. Now, let's turn to Blue Cross for a moment. Is it
9 your understanding that Blue Cross and Blue Shield of
10 Minnesota in this case is seeking to recover, by way of money
11 damages, the tobacco attributable portion of the actual
12 health care costs incurred by its members in fully insured
13 local groups?

14 A. That's my understanding.

15 Q. Just so you're clear, some of those fully insured local
16 groups might include state employees from 1983 earlier, but
17 that's a measure of Blue Cross's damages. Okay?

18 A. Okay.

19 MR. WILSON: Object to the form.

20 BY MS. RICHARD-NELSON:

21 Q. Now, turning, then, for a moment to the Blue Cross fully
22 insured groups. Do you have an understanding that Blue Cross
23 contracts directly with its providers who provide health care
24 to the members of its fully insured groups?

25 A. Yes.

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1 Q. And Blue Cross and Blue Shield of Minnesota also
2 contracts directly with the employers who purchase insurance
3 from Blue Cross and Blue Shield of Minnesota for their fully
4 insured groups?

5 A. Yes.

6 Q. Turning back a moment to look at the contract between
7 Blue Cross and Blue Shield of Minnesota and its providers.
8 Would you agree with me that the essence of that contract is
9 that those providers provide health care to subscribers and
10 Blue Cross and Blue Shield of Minnesota reimburses them at
11 some rate for that health care?

12 MR. WILSON: Object to the form.

13 THE WITNESS: I don't know what the exact
14 arrangement is.

15 BY MS. RICHARD-NELSON:

16 Q. You don't know whether Blue Cross and Blue Shield of
17 Minnesota directly reimburses its providers for the health
18 care it provides to its fully insured groups?

19 MR. WILSON: Object to the form.

20 THE WITNESS: I'm not familiar with their
21 arrangements with their providers. There are different
22 provider arrangements that are possible.

23 BY MS. RICHARD-NELSON:

24 Q. And you're not familiar with what they are?

25 A. Right.

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1 Q. Okay. Well, if you're not familiar, I'm going to have to
2 ask you to assume this for a moment. That Blue Cross and
3 Blue Shield enters into a direct contract with its providers
4 and that when the providers provide health care services to
5 the members of a fully insured group, they are reimbursed
6 directly by Blue Cross and Blue Shield of Minnesota. Okay?

7 A. Does it have contracts with all of the providers?

8 Q. Yes.

9 A. Who it reimburses?

10 Q. Yes.

11 A. So it's a closed model?

12 Q. It's a network of providers. A large network of
13 providers. If an insured seeks coverage outside of the
14 network, then there wouldn't be a contract, that's correct.

15 A. But the provider would potentially still be reimbursed
16 some portion.

17 Q. Yes. By way of this lawsuit, Blue Cross and Blue Shield
18 in Minnesota seeks to recover the tobacco attributable
19 portion of the reimbursement paid by Blue Cross to its
20 providers. Okay?

21 A. Okay.

22 Q. Would you agree with me that for a particular fully
23 insured group those individuals will incur certain health
24 care costs during a given year, Blue Cross will reimburse the
25 providers for those health care costs, and then that

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1 experience will be examined at the conclusion of that year to
2 determine the premium level for that group for the following
3 year. Is that generally true?

4 A. Depending on group size.

5 Q. Exactly. Assuming it's a credible group; is that true?

6 A. Fully credible?

7 Q. Fully credible.

8 A. Yes.

9 Q. So, if you look at it in a temporal basis, the first
10 thing that occurs is that the health care costs are incurred,
11 the second thing that occurs is that there is reimbursement
12 made by Blue Cross and Blue Shield of Minnesota to a
13 provider, and the third thing that occurs is that that annual
14 experience is evaluated to determine the following year's
15 premium. Have I done it temporally in a correct fashion?

16 MR. WILSON: Object to the form.

17 BY MS. RICHARD-NELSON:

18 Q. Again, assuming a fully credible group?

19 MR. WILSON: Same objection.

20 THE WITNESS: Well, it's hard to say
21 which occurs first.

22 BY MS. RICHARD-NELSON:

23 Q. Why is it hard to say which occurs first?

24 A. Because the first thing that occurs is the policy is
25 priced.

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1 Q. Yes. And it's priced based on previous experience, is it
2 not?

3 A. What if it's the first year the company has purchased
4 insurance.

5 Q. Okay. Well, let's try to make it even more simple.
6 Let's suppose it's not.

7 A. Not the first year?

8 Q. Right. Would you agree with me, as you stated in your
9 report, that for a fully credible group that Blue Cross rates
10 that group based on its prior experience?

11 A. Yes.

12 Q. So, that in that instance, the health care costs are
13 incurred, the reimbursement is paid, and then that year's
14 experience is reviewed and a rate is determined for the
15 premium for the following year based on that experience
16 review?

17 A. That's true.

18 Q. I want you to take your report and turn to the
19 introduction.

20 A. (Complies).

21 Q. It says, I was retained by the defendant's counsel in
22 this action to examine from an insurance perspective the loss
23 mitigation alternatives available to and the choices made by
24 Blue Cross and Blue Shield of Minnesota, the state of
25 Minnesota, and customers of Blue Cross and Blue Shield of

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1 Minnesota regarding the loss costs attributable to smoking
2 alleged in the expert reports of Scott L. Zeger, Ph.D.,
3 Timothy Wyant, Ph.D. and Leonard S. Miller, Ph.D. Have I
4 accurately read your introduction?

5 A. Yes.

6 Q. What do you mean by loss mitigation alternatives?

7 A. Methods to lessen losses.

8 Q. Okay. So, since the measure of damages here is the
9 tobacco attributable portion of the health care costs
10 reimbursed to providers, is it your position that you can
11 offer an opinion to reduce an amount what those tobacco
12 attributable health care costs are?

13 MR. WILSON: Object to the form.

14 THE WITNESS: That you can reduce the
15 amount?

16 BY MS. RICHARD-NELSON:

17 Q. Of the tobacco attributable health care costs?

18 MR. WILSON: Object to the form.

19 BY MS. RICHARD-NELSON:

20 Q. Or are you just shifting responsibility for premium?

21 MR. WILSON: Object to the form. What
22 question would you like him to answer?

23 MS. RICHARD-NELSON: Well, let's start
24 with the first.

25 BY MS. RICHARD-NELSON:

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1 Q. Are you intending by this report to offer an opinion as
2 to ways in which Blue Cross and Blue Shield of Minnesota
3 could reduce the total volume of tobacco attributable health
4 care costs for any given year that it reimburses to its
5 providers? Reduce that amount.

6 A. Yes.

7 Q. So, that if in one year the total health care costs
8 attributable to tobacco are \$2,000 for a given group, your
9 opinions are that Blue Cross can do things to reduce that to
10 something less than \$2,000 in terms of costs?

11 A. They could have.

12 Q. In other words, the check the next year to the providers
13 would be something less for tobacco attributable cause?

14 A. Yes.

15 Q. Okay. What is it that Blue Cross and Blue Shield of
16 Minnesota could have done in your view that would reduce the
17 tobacco attributable health care costs for any group in a
18 given year, the amount of the checks written out to the
19 providers?

20 A. Yes.

21 Q. Okay. What is that?

22 A. They could have imposed differential premiums based on
23 tobacco use.

24 Q. And how would that reduce the amount of money Blue Cross
25 writes out to the provider?

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1 A. It would encourage people -- and I'm basing this on the
2 assumption that the Zeger, Wyant and Leonard Miller report is
3 accurate. We're just assuming that these costs exist. If
4 they do and they created the differential premium structure
5 based on the use of tobacco, then that would have created an
6 economic incentive for individuals to not smoke, assuming
7 that was creating higher health care costs.

8 Q. Okay. So, to the extent that a differential premium
9 based on smoking serves as an incentive for smokers to quit
10 smoking, Blue Cross overtime could reduce its tobacco
11 attributable health care costs; is that correct?

12 A. That's correct.

13 Q. Now, for any given year, can you calculate or estimate
14 the amount that those health care costs would be reduced for
15 any given group based on the fact that this is an incentive
16 to stop smoking?

17 A. Are you asking me if I can calculate it or if it's
18 calculable.

19 Q. If it's calculable for any given group?

20 A. I believe that it is calculable.

21 Q. Wouldn't you agree with me, however, that shifting
22 premium burden in a way which shifts the premium attributable
23 to the tobacco attributable health care costs, doesn't change
24 the amount of the checks that Blue Cross writes to its -- to
25 reimburse its providers?

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1 MR. WILSON: Object to the form.

2 BY MS. RICHARD-NELSON:

3 Q. Do you understand my question?

4 A. Could you ask it again.

5 Q. Sure. Perhaps it would be better to do it in the context

6 of your example. I think you have an example --

7 Unfortunately, your report doesn't have pages on it. But if

8 you go to --

9 A. I see it.

10 Q. -- paragraph number 8. Above paragraph number 8 you have

11 an example of a group. Do you see that?

12 A. Yes.

13 Q. Okay. And that -- the assumptions you make there are

14 that the total group medical costs are \$11,000; is that

15 correct?

16 A. That's correct.

17 Q. And that the group medical costs attributable to smoking

18 are \$1,000; is that correct?

19 A. That's correct.

20 Q. And the medical costs not attributable to smoking are

21 \$10,000; is that correct?

22 A. That's correct.

23 Q. And that you have a group of 1,000 employees; is that

24 correct?

25 A. That's correct.

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- 1 Q. Seven hundred and fifty of whom are nonsmokers, 250 of
2 whom are smokers; is that correct?
- 3 A. That's correct.
- 4 Q. That employer group writes a check, does it not, to Blue
5 Cross each year for \$14 per employee per month; is that
6 correct, under your scenario?
- 7 A. No. That's not correct.
- 8 Q. Well, the employer is the purchaser of health care; is
9 that correct? The employer writes the check to Blue Cross.
10 And under your scenario the employer takes its \$10 and the
11 smokers \$4 and sends that off to Blue Cross; is that correct?
- 12 A. That's correct.
- 13 Q. Okay. So that \$14 is sent by the employer group to Blue
14 Cross; is that correct?
- 15 A. For the smokers. It's \$10 for the nonsmokers.
- 16 Q. Well, the premium contributions you have zero for
17 nonsmoker. My understanding of your assumptions here is that
18 the employer pays the entire cost for the nonsmokers; is that
19 right?
- 20 A. Right.
- 21 Q. Okay. So the check that goes from the group to Blue
22 Cross for all health care costs for that -- excuse me -- for
23 all premium for that group is \$14, is it not?
- 24 A. The total medical costs are 11,000.
- 25 Q. Yes.

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- 1 A. There are a thousand employees.
- 2 Q. Yes.
- 3 A. So it would be in average of \$11 per employee.
- 4 Q. How much is the premium that the employer pays to Blue
- 5 Cross under your scenario per year?
- 6 A. For the whole group? Smokers or nonsmokers?
- 7 Q. Yes.
- 8 A. It would be \$11,000.
- 9 Q. Okay. The premium is the same as the group's medical
- 10 costs in your scenario?
- 11 A. We've assumed -- I've assumed. I did this. No
- 12 transactions costs.
- 13 Q. Okay. All right. So just so I understand it, the
- 14 employer has purchased a policy with Blue Cross?
- 15 A. Yes.
- 16 Q. The employer sends a check to Blue Cross for \$11,000 for
- 17 premium; is that correct?
- 18 A. Yes.
- 19 Q. And, internally, the employer recovers some of that --
- 20 requires the smokers to contribute something and does not
- 21 require the nonsmokers to contribute something. Is that what
- 22 happens?
- 23 A. That's correct.
- 24 Q. Okay. Let's suppose you have another group, identical
- 25 facts, except in that group the employer picks up the whole

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1 tab. Okay?

2 A. Okay.

3 Q. Blue Cross gets the same amount in premium from each

4 employer; is that not right?

5 A. That's right.

6 Q. Okay. So the differential is something that occurs

7 internal within the employer group; is that correct?

8 A. That's right.

9 Q. And it affects the amount of contribution the employer

10 seeks from his or her employees; is that correct?

11 A. That's correct.

12 Q. When Blue Cross and Blue Shield pays for the health care

13 costs for that group, they write a check for \$11,000 to the

14 providers of that group in that year; is that correct?

15 A. That's correct.

16 Q. And they do that whether the group has an internal

17 differential or not, do they?

18 A. If we're going to assume that the group medical costs are

19 the same between the two groups.

20 Q. Yes. Yes. If we assume that?

21 A. Right.

22 Q. So the presence of the differential -- if the total group

23 medical costs are the same for the two groups, the presence

24 of the differential doesn't impact at all the amount of money

25 that Blue Cross pays to its providers; is that correct?

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1 MR. WILSON: Object to the form.

2 BY MS. RICHARD-NELSON:

3 Q. Should we try that again?

4 A. Please.

5 Q. If the total group medical costs remain the same for the
6 group that has the differential and the group that does not
7 have the differential, the amount of money that Blue Cross
8 pays to its providers, that \$11,000, is the same for both
9 groups, is it not?

10 A. Yes.

11 Q. And the only way in which the presence of that
12 differential could impact the amount of money that Blue Cross
13 pays to its providers is if the differential, indeed,
14 incentivizes nonsmoking and the result of that nonsmoking is
15 a reduction in total group medical costs; is that correct?

16 A. That's what I mentioned earlier. There may also be
17 employment changes.

18 Q. What do you mean by that?

19 A. People may switch who they work for.

20 Q. Because they don't want to pay the differential; is that
21 correct?

22 A. That's correct.

23 Q. Okay. Or smokers may choose not to be a part of the
24 group policy, right?

25 A. If they have the choice.

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1 Q. Sure. So the employer does not have control, 100 percent
2 control, over whether the employees will either stay at the
3 plan or whether they'll opt for the group policy, do they?

4 A. In which case?

5 Q. Where there's a differential.

6 A. I believe that's correct.

7 Q. Do you believe that smoking causes increased health care
8 costs?

9 A. I don't have any professional opinion about that.

10 Q. Well, if you don't have an opinion on whether smoking
11 causes increased health care costs, how can you have an
12 opinion that if you encourage people not to smoke those
13 health care costs might go down?

14 MR. WILSON: Object to the form.

15 THE WITNESS: Earlier I said that we were
16 just going to assume that the report by Zeger, Wyant and
17 Miller is correct.

18 BY MS. RICHARD-NELSON:

19 Q. So you're assuming for purposes of your opinion is that
20 smoking causes increased health care costs?

21 A. I'm assuming the accuracy of the report that I just
22 mentioned.

23 Q. But now I'm asking you, are you assuming that smoking
24 causes increased health care costs?

25 A. If that's consistent with that report.

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1 Q. And as you're sitting here today, you don't know if
2 that's consistent?

3 A. I believe that what they said in that report was that
4 they felt there was a link between smoking and increased
5 health care costs. And so when I'm saying that I'm assuming
6 the accuracy of their report, all I'm saying is that I
7 believe that your second question was subsumed in the first.
8 Am I misunderstanding your second question?

9 Q. If you're offering an opinion in this litigation that
10 providing a differential premium as an incentive to people to
11 stop smoking and that that incentive could result in lower
12 medical costs, I am assuming that you are offering that
13 opinion with the assumption that smoking causes increased
14 health care costs?

15 MR. WILSON: Object to the form.

16 THE WITNESS: All I'm saying is that if
17 we assume the accuracy of their report, then I would expect
18 that it would have that effect. If we assume the accuracy of
19 their report. I'm not making any statements about something
20 that I have no area of expertise in.

21 BY MS. RICHARD-NELSON:

22 Q. I know you haven't reviewed the deposition testimony of
23 the Blue Cross employees who have testified on this subject.
24 But are you aware that Blue Cross and Blue Shield of
25 Minnesota is very dedicated to the implementation of

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1 differential premiums in any policy for the purposes of
2 incentivizing nonsmoking?

3 A. I did read in one of the depositions that they do have a
4 program for that. And I believe that I also read their
5 internal program for their employees contains such a
6 provision.

7 Q. Okay. So you have no reason to disagree with the
8 statement that Blue Cross and Blue Shield of Minnesota is
9 dedicated to implementing differential premiums in any
10 policy, if it's asked to do so, for the purpose of
11 incentivizing nonsmoking to reduce health care costs?

12 A. I don't know if they're dedicated or not. I know they
13 have that program for their own employees and they've made it
14 available for other employee groups as well.

15 Q. They've made it available in the individual insurance
16 market, have they not?

17 A. I believe that's true.

18 Q. They've made it available in the Medicare supplement
19 market, have they not?

20 A. I believe that's true.

21 Q. They've made it available any time a group approaches
22 them and says they want a differential they give it to them?

23 A. That, I don't know. I would assume that they make it
24 available to everyone.

25 Q. Well, if that's the case, what more could Blue Cross do

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1 to incentivize nonsmoking through differential premiums?

2 MR. WILSON: Object to the form.

3 THE WITNESS: I don't know right now what
4 more they can do. I don't know.

5 MS. RICHARD-NELSON: It's 12:25. Should
6 we take a break.

7 (Lunch recess taken.)

8 (Defendants' Exhibit 4208 was
9 marked for identification.)

10 BY MS. RICHARD-NELSON:

11 Q. Do you recall, Mr. Browne, this morning we were talking
12 about an exhibit, Defendants' Exhibit 4206, which is the
13 court order pertaining to expert witness reports?

14 A. Yes.

15 Q. And do you recall we were talking about subparagraph
16 little F under II A, 1 of that order?

17 A. Yes.

18 Q. I'll show you what's been marked as Defendants' Exhibit
19 4208. I'm going to ask you to take a moment to review that.

20 A. Okay.

21 Q. Okay. Does 4208 represent all of your notes
22 handwritings, calculations, or other documents of any kind or
23 nature existing at the time of the service of the expert's
24 signed report, and that is with the exception of the articles
25 that you wrote and the documents that you've identified in

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1 your report? That question probably sounds too long. Let's
2 try it again.

3 With the exception of any articles you've published
4 and with the exception of any documents produced in this
5 litigation that you have reviewed, does Defendants' Exhibit
6 4208 represent all notes, handwritings, calculations or other
7 documents of any kind or nature that were existing in your
8 file at the time of -- you gave your signed expert report to
9 your counsel?

10 A. There were also communications with counsel.

11 Q. Okay.

12 A. That are not included.

13 Q. Written communications?

14 A. Yes.

15 Q. And with the exception of written communications, are
16 there any other such notes, handwritings, calculations and
17 documents?

18 A. That would be everything.

19 Q. Okay. Let's turn --

20 A. Just thinking of how I answered your question. And I
21 don't want to be misleading. So notes that I made while
22 talking to counsel, I meant when I answered your question,
23 not simply letters that I wrote to counsel.

24 Q. Okay.

25 A. I don't know if you understood that or not.

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1 Q. Well, thank you for the clarification. Anything else?

2 A. No.

3 Q. Let's turn for a moment back to the subject of Blue Cross
4 and Blue Shield of Minnesota fully insured groups that we
5 were talking about before lunch. Do you recall?

6 A. Yes.

7 Q. When a fully insured group purchases a policy from Blue
8 Cross and Blue Shield of Minnesota, a health care policy, who
9 does the purchasing? Who is the purchaser?

10 A. The employer.

11 Q. And it is the prerogative of the employer, is it not, to
12 determine whether and at what levels the employer will seek
13 contribution from its employees; is that correct?

14 A. Yes.

15 Q. Have you done any kind of research which would -- which
16 has revealed to you the number of fully insured employer
17 groups in the state of Minnesota in 1997, who have
18 implemented a differential premium requiring differing
19 contributions from its employees based on smoking?

20 A. No. I haven't.

21 Q. Are you aware of any employers in the state of Minnesota
22 with the exception of Blue Cross and Blue Shield of Minnesota
23 who have instituted such a premium differential?

24 A. In one of the depositions there was mention that several
25 other companies did institute differential premium

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1 structures.

2 Q. And that deposition was referring to companies that did
3 so and are insured with Blue Cross and Blue Shield of
4 Minnesota; is that correct?

5 A. That's correct.

6 Q. With the exception of the companies that have instituted
7 a differential in their premium structure with Blue Cross and
8 Blue Shield of Minnesota, are you aware of, as you sit here
9 today, any other employers in the state of Minnesota who have
10 exercised that prerogative with their employees?

11 A. No. I'm not aware of any others.

12 Q. And you understand that the employers who purchase health
13 care coverage from Blue Cross and Blue Shield of Minnesota
14 are not parties to this litigation; is that correct?

15 A. That's correct. That's my understanding.

16 Q. You're aware, are you not, that in 1983 Blue Cross and
17 Blue Shield of Minnesota retained the services of Peat
18 Marwick and a woman by the name of Susan Showalter to do
19 reports to them establishing an actuarial basis for a
20 differential premium based on smoking?

21 A. Is that the same as the Bloom reports?

22 Q. No.

23 A. No. The names are familiar and I think I saw some
24 documents in that regard. Where the names came up in one of
25 the depositions that I read. Showalter.

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1 Q. And are you aware that Peat Marwick and Susan Showalter
2 made certain recommendations to Blue Cross with respect to
3 the implementation of a differential based on smoking?

4 A. I don't recall that right now.

5 Q. Do you recall that Blue Cross and Blue Shield of
6 Minnesota was one of the first, if not the first, carrier of
7 health care coverage in the state of Minnesota to offer a
8 differential premium in 1983, to its individual purchasers of
9 health care?

10 MR. WILSON: Object to the form.

11 THE WITNESS: I'm not aware of what other
12 companies do or how long they've done it. So I didn't know
13 that they were the first if they were.

14 BY MS. RICHARD-NELSON:

15 Q. Are you aware that their purpose in instituting that
16 differential in their individual policies was for the purpose
17 of incentivizing nonsmoking?

18 A. I didn't know that was their purpose.

19 Q. Are you aware of any group who has approached Blue Cross
20 and Blue Shield of Minnesota at any time since the Peat
21 Marwick and Susan Showalter work in 1983, requesting the
22 opportunity to differentiate a premium among their employees
23 based on smoking where Blue Cross and Blue Shield has told
24 them, no, you may not do that?

25 A. No. I'm not aware of any.

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1 Q. You mentioned before the lunch break that by instituting
2 a differential premium an employer might incentivize
3 nonsmoking, but might also discourage smoking employees from
4 accepting that employer's insurance policy. Do you recall
5 that testimony?

6 A. Yes.

7 Q. Do you have an opinion in this case that the employers in
8 the state of Minnesota should implement a differential within
9 their employee group for the purpose of discouraging their
10 smoking employees from having health care coverage?

11 A. No. That's not one of my opinions in the case.

12 Q. Wouldn't you agree that if the result of instituting a
13 differential premium in an employer group would be to
14 increase the percentage of smoking employees who were
15 uninsured within that group that that would be an undesirable
16 result?

17 MR. WILSON: Object to the form.

18 THE WITNESS: That what would be an
19 undesirable result?

20 BY MS. RICHARD-NELSON:

21 Q. That you would have -- by instituting the premium you
22 would be encouraging your smoking employees not to accept
23 health care insurance?

24 MR. WILSON: Object to the form.

25 THE WITNESS: By itself, that's not a

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1 good result if health insurance is valuable to people, which
2 I believe that it is, but that has to be weighed against
3 other benefits that would be achieved by doing that.

4 BY MS. RICHARD-NELSON:

5 Q. And isn't it in the employer's best interest to ensure
6 that his employees have health care coverage?

7 MR. WILSON: Object to the form.

8 THE WITNESS: That's something that
9 employers need to decide. Many different employment
10 situations.

11 BY MS. RICHARD-NELSON:

12 Q. Certainly, Blue Cross and Blue Shield of Minnesota would
13 have no say in that judgement made by an employer, would
14 they?

15 MR. WILSON: Object to the form.

16 THE WITNESS: In what?

17 BY MS. RICHARD-NELSON:

18 Q. In whether or not to institute the premium differential
19 within the employer group?

20 A. They would have no say in that?

21 Q. Blue Cross and Blue Shield of Minnesota wouldn't have any
22 say in whether a particular employer chooses to change its
23 contribution levels between its employees?

24 MR. WILSON: Object to the form.

25 BY MS. RICHARD-NELSON:

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1 Q. So long as the final premium check that goes to Blue
2 Cross is the correct amount?

3 MR. WILSON: Object to the form.

4 THE WITNESS: They could have an
5 incentive to -- or a desire, I should say, to encourage
6 employers to adopt differential premiums.

7 BY MS. RICHARD-NELSON:

8 Q. They could and do engage in a program of incentivizing
9 nonsmoking for a variety of reasons, but the ultimate
10 decision is that of the employer, is it not?

11 A. The ultimate decision?

12 Q. Yes.

13 A. In most cases.

14 Q. In what instance would it not be the ultimate decision of
15 the employer to decide how to differentiate premium among its
16 employees?

17 A. May have union input.

18 Q. Okay. So, there are instances in which the unions might
19 dictate whether or not there's a differential premium?

20 A. I wouldn't say dictate, but certainly influence the
21 decision.

22 Q. Okay. So, wouldn't you agree with me that it's either
23 the employer's decision or it's a decision that is jointly
24 held between the employer and union whether to institute a
25 differential premium?

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1 A. At a certain level you could also -- I could argue --
2 would argue that the labor market conditions will influence
3 that decision. That employers need to act in a labor market
4 and at some level that's going to force their decisions as to
5 what employee benefits to offer and what structure those
6 employee benefits will take.

7 Q. So, the labor market may influence the employer's
8 judgement, that's what you're saying?

9 A. That's right.

10 Q. But the ultimate judgement, regardless of what influences
11 it, is made by the employer and/or the employer and the
12 union; is that correct?

13 A. That's correct.

14 Q. Turning to the first page of your report now, paragraph 2
15 says, The alleged loss costs attributable to smoking that
16 employers providing experience-rated group health insurance
17 coverage would have incurred due to higher premiums could
18 have been mitigated by employers by charging employees who
19 smoke a greater health insurance contribution rate than that
20 charged to nonsmokers. And my understanding of what you're
21 saying here is that employers could have mitigated the
22 tobacco attributable health care cost attributable to their
23 population by charging an internal differential premium
24 because that differential premium would incentivize certain
25 smokers to stop smoking. Is that what you mean?

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1 MR. WILSON: Object to the form.

2 THE WITNESS: And in addition to costs
3 that allegedly result from the smoking would be borne by the
4 smokers.

5 BY MS. RICHARD-NELSON:

6 Q. Well, let's talk about that. The costs, as we talked
7 about earlier, are the amounts of money that Blue Cross pays
8 to reimburse its providers; is that correct?

9 MR. WILSON: Object to the form.

10 BY MS. RICHARD-NELSON:

11 Q. The tobacco attributable health care costs that we're
12 seeking in this lawsuit is a percentage of the reimbursement,
13 not a percentage of the premium, right? We are seeking a
14 percentage of the actual health care costs. Do you
15 understand that?

16 A. Yes.

17 Q. Okay. And the question is: How can you reduce that
18 amount? That's what mitigating that amount means, does it
19 not?

20 A. In a sense. But it's also referring to the fact that the
21 costs which allegedly arise from smoking could be borne by
22 different parties. One possible party to bear those costs
23 could be the people who are smoking.

24 Q. But if you shift that premium as between parties, if you
25 shift it between people with brown hair and people with red

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1 hair or tall people and short people or smokers and
2 nonsmokers, and shift the premium all you want, but the
3 amount of the tobacco attributable health care costs doesn't
4 go down one cent, does it? It's just that you're shifting
5 the burden of it to different people?

6 MR. WILSON: Object to the form.

7 THE WITNESS: Well, as I mentioned
8 earlier, there would be incentives not to smoke.

9 BY MS. RICHARD-NELSON:

10 Q. Yes. But I just want the record to be clear that the
11 only way to reduce the amount of the tobacco attributable
12 health care cost is, indeed, what you've said. And that is
13 incentivize people to stop smoking, because, hopefully, they
14 stop smoking, they'll not get as sick and they will not incur
15 as many health care costs, right?

16 A. That's what we mentioned.

17 Q. That's what you mean, isn't it?

18 A. Right. And we also mentioned that there would be an
19 incentive for some people, smokers, if you're charging
20 differential premiums for the smokers to perhaps seek jobs
21 with firms that do not have differential cost premiums.

22 Q. Okay.

23 A. And there would also be an incentive for employees too,
24 who smoke, would have a larger premium to not opt for the
25 health insurance coverage.

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1 Q. Right. So, it's the incentive not to smoke, it's the
2 incentive to go to a different employer, or it's an incentive
3 not to take the health care coverage. Those are the three
4 incentives that might result in lowering the tobacco
5 attributable health care costs; is that right?

6 A. That's right.

7 Q. But shifting the amount of the premium as among employees
8 doesn't change the amount of the tobacco attributable health
9 care cost, does it, in the absence of the incentives we just
10 talked about?

11 MR. WILSON: Object to the form.

12 THE WITNESS: Well, that's right.

13 BY MS. RICHARD-NELSON:

14 Q. Okay. And your opinion in paragraph 2 is an opinion that
15 employers could have mitigated these costs by implementing a
16 differential premium?

17 A. That the costs that the employer's bore would have been
18 different had differential premiums been used.

19 Q. Because of the incentives we've just talked about?

20 MR. WILSON: Object to the form.

21 THE WITNESS: And because the employees
22 who smoke would bear part of the cost.

23 BY MS. RICHARD-NELSON:

24 Q. Okay. So the employers wouldn't have as high a premium
25 that they'd need to pay because they were giving some of that

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1 premium to the smokers to pay?

2 A. They were charging that to the smokers, that's right.

3 Q. None of that has to do with Blue Cross's claim for

4 damages in this case. Blue Cross isn't an employer here.

5 Blue Cross and Blue Shield is the insurer here. And the only

6 way to mitigate Blue Cross's damages is to reduce the amount

7 of the tobacco attributable health care costs, right?

8 MR. WILSON: Object to the form.

9 BY MS. RICHARD-NELSON:

10 Q. Since that's their measure of damages?

11 MR. WILSON: Same objection.

12 THE WITNESS: I'm sorry. Could you

13 repeat that one more time?

14 BY MS. RICHARD-NELSON:

15 Q. Sure. You're talking about how an employer might be able

16 to mitigate its health care costs, correct?

17 A. Yes.

18 Q. Employers aren't parties to this litigation, correct?

19 A. Well, that's what you said earlier.

20 Q. Yes. The question is: How could Blue Cross and Blue

21 Shield of Minnesota, the insurer, mitigate its damages? And

22 the only way to mitigate its damages is to reduce the amount

23 of its damages and its damages are the tobacco attributable

24 health care cost that it pays to its providers, right?

25 A. Right.

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1 Q. Now look at opinion number three. The allege loss costs
2 attributable to smoking that employers provide a manually-
3 rated group health insurance coverage would have incurred due
4 to higher premiums could have been mitigated by employers by
5 charging employees who smoke a greater health insurance
6 contribution rate than that charged to nonsmokers. Did I
7 read that correctly?

8 A. Yes.

9 Q. And, again, your opinion here has to do with how
10 employers could mitigate their damages; is that correct?

11 A. That's correct.

12 Q. Number 4, The state of Minnesota could have mitigated the
13 alleged loss costs attributable to smoking arising from its
14 employees' use of tobacco by charging its employees who smoke
15 a greater health insurance contribution rate than that
16 charged to nonsmokers. Did I read that correctly?

17 A. Yes. You did.

18 Q. So, your opinion there is that the state of Minnesota as
19 an employer could have mitigated these costs by shifting the
20 burden premium -- the premium burden of tobacco attributable
21 health care costs to its smokers; is that correct?

22 A. That's correct.

23 Q. But you're aware now that the state of Minnesota is not
24 seeking any damages in this case for the tobacco attributable
25 health care costs of the state of employees?

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1 A. That's what you mentioned earlier.

2 Q. Let's take a moment to talk about the state employee
3 group insurance program.

4 (Defendants' Exhibit 4209 was
5 marked for identification.)

6 BY MS. RICHARD-NELSON:

7 Q. Mr. Browne, I show what has been marked as Defendants'
8 Exhibit 4209, and ask if you've ever seen that document
9 before.

10 MS. RICHARD-NELSON: I have another
11 copy.

12 MR. WILSON: That's okay. I can look
13 on.

14 THE WITNESS: This may have been in the
15 materials that I reviewed in June. Otherwise, I haven't seen
16 it before.

17 BY MS. RICHARD-NELSON:

18 Q. Okay. Who's Touche Ross & Company, do you know?

19 A. It's a consulting firm.

20 Q. Is it a reputable consulting firm?

21 A. As far as I know.

22 Q. Would you turn to what is page 6 of the report. It can
23 be found at MN 00438977.

24 MS. RICHARD-NELSON: The record should
25 also reflect that this document has been marked confidential

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1 in the Minnesota tobacco litigation which means that the
2 entire transcript needs to be marked confidential.

3 BY MS. RICHARD-NELSON:

4 Q. Do you see at the top where it says Background and
5 Objectives?

6 A. Yes.

7 Q. Under background it says, The state of Minnesota
8 Department of Employee Relations is responsible for the group
9 insurance program covering employees of the state of
10 Minnesota and the University of Minnesota. The program
11 provides group insurance coverage for approximately 32,000
12 state employees and 15,000 university employees in addition
13 to about 2,500 retirees. The group insurance benefits
14 provided are virtually identical under the various collective
15 bargaining agreements for the state and university
16 employees. The amount of group insurance and the amount of
17 premium paid for the medical and dental coverage by the state
18 differs somewhat between the various bargaining agreements.
19 Did I read that correctly?

20 A. Yes.

21 Q. And is that your basic understanding of the
22 responsibility of the Department of Employee Relations?

23 A. That's pretty much all I know about them.

24 Q. Are you aware that in 1982 and 1983, the Department of
25 Employee Relation retained the services of Touche Ross &

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1 Company to provide them with some guidance in carrying out
2 their responsibilities of providing group insurance coverage
3 to state and university employees.

4 A. I accept it as true.

5 Q. Okay. And this is, indeed, is it not, the final report
6 that -- that you can see from the front cover it represents
7 Touche Ross & Co.'s final recommendations on potential
8 changes to the administration, design and financing of the
9 group insurance program of the state of Minnesota and the
10 University of Minnesota; is that correct?

11 A. I don't know. If you're representing that to me, I can
12 believe it. It seems to be missing a couple of pages on the
13 front.

14 Q. What pages is it missing?

15 A. Mine begins with number 3.

16 Q. Indeed, it does. Why don't we correct that. Let me have
17 that exhibit and I'll substitute this one. The record should
18 reflect that the witness correctly pointed out to me that the
19 exhibit marked Defendants' Exhibit 4209 was missing a few
20 pages and we have substituted a full set.

21 (Remark Exhibit 4209.)

22 MS. RICHARD-NELSON:

23 Q. And I'd ask you to take a look at that?

24 A. Okay.

25 Q. And the front cover is a letter to the state of Minnesota

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1 Department of Employee Relations dated January 24, 1983, from
2 Touche Ross & Co.; is that correct?

3 A. That's correct.

4 Q. And Touche Ross & Co. states that this report represents
5 our final recommendations on potential changes to the
6 administration, design and financing of the group insurance
7 program of the state and University of Minnesota; is that
8 correct?

9 A. That's correct.

10 Q. If you turn for a moment to page 40, which can be found
11 at MN 00439013.

12 A. Okay.

13 Q. It states Objectives, does it not?

14 A. Yes. It does.

15 Q. The objectives of our recommendation and the group medical
16 insurance program which results from these recommendations
17 are as follows, and there are a series of objections --
18 objectives listed, are there not?

19 A. Yes. There are.

20 Q. In fact, the third objective states, The design of the
21 medical program should, if possible, encourage a healthy
22 lifestyle and early detection of illness to promote good
23 health and avoid more costly treatment in the future. Is
24 that correct?

25 A. That's correct.

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1 Q. If you look at page 107 of the report it can be found on
2 MN 00439082. Do you see that?

3 A. Yes. I do.

4 Q. It's called Non-Smoker Discount. Do you see that?

5 A. Yes.

6 Q. And this is what Touche Ross & Co. says to the Department
7 of Employee Relation, does it not? This coverage has been
8 requested by certain employees to the Department of Employee
9 Relations. Our recommendation is that this coverage is too
10 difficult to administer and not conducive to a group
11 insurance type of plan. Nonsmoker discounts are more
12 appropriate to individually written insurance. Do you see
13 that?

14 A. Yes.

15 Q. And that was the advise that Touche Ross & Co. gave to
16 the state of Minnesota in 1983, was it not?

17 A. That's how you represented it to me.

18 Q. You have no reason to believe otherwise?

19 A. I believe you.

20 Q. Are you aware that from time to time Touche Ross & Co.
21 was retained subsequent to 1983, for purposes of giving the
22 state advice on its state group insurance employee program --
23 state group employee insurance?

24 A. I did not know that.

25 Q. So you're not aware of any subsequent changes in that

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1 recommendation with respect to nonsmoker discounts, are you?

2 A. No. I'm not.

3 Q. Let's suppose that a group purchaser determined that it
4 wanted to implement a differential premium among its
5 employees based on smoking. It came to Blue Cross and it
6 said, How do I do it? How do I develop an actuarial basis
7 for setting a premium? Are you here to testify, at all,
8 about how Blue Cross might make a recommendation to an
9 employer group that requested actuarial advice on how to set
10 a differential premium?

11 A. Could you rephrase that?

12 Q. Okay. I'll try it one more time. Let's suppose an
13 employer made the decision that it wanted a differential
14 premium for its group based on smoking. Okay?

15 A. Okay.

16 Q. An employer came to Blue Cross and said we have a group
17 policy with you. We would like, however, to differentiate
18 our premium among our employees as between smokers and
19 nonsmokers.

20 A. Okay.

21 Q. And we'd like to do that in a way that has an actuarially
22 valid basis.

23 A. Okay.

24 Q. Are you here to testify, Mr. Browne, at all, on how Blue
25 Cross would calculate the appropriate differential for that

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1 particular group on an actuarially valid basis?

2 A. No.

3 Q. Okay. So, for instance, you have no opinions or perhaps
4 you do, as to -- let's start again. Do you have an opinion
5 as to whether or not one can determine that tobacco
6 attributable costs attributable to a single employer group
7 for a single year?

8 A. If we assume that there is a difference in costs
9 attributable to tobacco use, then it's my opinion that the
10 type of calculations you described can be done.

11 Q. And they can be done for a single employer group?

12 A. If the employer group is of sufficient size, then you
13 could do it with full credibility. If it's a small firm,
14 then you would have to do it a bit differently, but you could
15 come up with a differential premium structure.

16 Q. Okay. How big would the employer group have to be for it
17 to have full credibility in your mind?

18 A. There are statistical tables that would provide that
19 answer. I don't have them with me right now.

20 Q. Okay. But it is your testimony that an employer group of
21 a sufficient size to have full credibility, that one could
22 develop a model to determine the tobacco attributable health
23 care costs of that group?

24 A. If there's a difference in tobacco-related costs, then
25 that could be done.

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1 Q. And one could do that on an annual basis? They could do
2 it for 1993, 1994 and 1995 and so on?

3 A. I agree with that. The methodologies that I have seen
4 incorporate several prior years of data to come up with the
5 current year's premium.

6 Q. Okay. What data would you need to determine that,
7 tobacco attributable costs of the group?

8 A. I haven't been asked to consider that.

9 Q. So you don't know?

10 A. Not as I'm sitting here right now.

11 Q. Let's suppose you had the information that Blue Cross
12 has. It has the health care costs for a particular year or
13 years, it has demographic information about the group, and it
14 has diagnosis codes that are associated with those health
15 care costs. Would that be sufficient information to
16 calculate tobacco attributable health care costs?

17 A. Right now I don't know. I haven't been asked to look at
18 that.

19 Q. For instance, how would Blue Cross know which diagnosis
20 codes represent disease caused by smoking?

21 A. That's something I'm not prepared to testify about.

22 Q. Okay. But you are prepared to testify that one could
23 take an employer group and if it were fully credible,
24 according to the statistical charts that are generally
25 available in underwriting, one could make a valid

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1 determination of the tobacco attributable health care costs
2 of a group for that particular year?

3 A. Yes. That those methodologies exist.

4 Q. Okay. Now, look at paragraph 7 of your opinions for a
5 moment. You say, The business experience of Blue Cross and
6 Blue Shield of Minnesota demonstrates that it has chosen to
7 employ different loss mitigation strategies to service its
8 customers, maintain financial strength, and meet regulatory
9 requirements during the past twenty years. These include
10 strengthening underwriting practices, refining the provisions
11 in its policies, and developing incentives for subscribers to
12 use economical providers. Did I read that correctly?

13 A. Yes.

14 Q. Are you saying that Blue Cross and Blue Shield over the
15 years has engaged in cost containment initiatives that have
16 the effect of reducing their health care costs that they pay
17 to their providers?

18 A. That's not exactly what I'm saying there.

19 Q. Well, for instance, you talk about strengthening
20 underwriting practices and the like. Let me give you an
21 example: Are you aware that sometime in the 1970's or 1980's
22 Blue Cross initiated a pre-authorization policy -- I think
23 you referred to it later in your report -- which required
24 certain hospitals to get pre-authorization before patients
25 could be admitted?

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1 A. Pre-admission certification?

2 Q. Pre-admission certification. Are you aware of that
3 program?

4 A. That does sound familiar.

5 Q. And isn't the purpose of a program like that to give Blue
6 Cross the opportunity to make sure that that hospital is
7 being properly utilized and not over utilized by patients?

8 A. I think that's a fair statement.

9 Q. And so that initiative, that pre-admission certification
10 is an initiative, the purpose of which, is to lower health
11 care costs, right?

12 A. That's one of the purposes.

13 Q. Okay. Another program of Blue Cross is to intervene with
14 higher risk pregnancies. Are you familiar with that program?

15 A. I think that I saw something about that.

16 Q. And to try to educate the mother in a high risk pregnancy
17 about healthy behaviors during the pregnancy to reduce the
18 likelihood of a premature birth. Are you aware of that?

19 A. That does sound familiar.

20 Q. And that the result of such an initiative is, foremost,
21 that we'll have healthier babies, correct?

22 A. I don't know what the foremost purpose is. That's
23 obviously one purpose.

24 Q. Okay. And another purpose is that that will reduce the
25 costs associated with premature birth?

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1 A. Presumably.

2 Q. So now I've given you two examples of cost containment
3 initiatives that Blue Cross has implemented over the years;
4 is that correct?

5 A. Yes.

6 Q. And with respect to differential premiums, acknowledging
7 the differential premiums might incentivize healthy
8 lifestyles, wouldn't you agree with me that Blue Cross and
9 Blue Shield has done everything within its power to implement
10 those premiums in its individual plans, in its Medicare
11 supplement plans and to respond to any employer who wishes to
12 implement that in its plan?

13 MR. WILSON: Object to the form.

14 THE WITNESS: I don't know what all the
15 powers of Blue Cross and Blue Shield are to do that. So I
16 can't say that they've done everything within their power to
17 establish that. I just don't know.

18 BY MS. RICHARD-NELSON:

19 Q. But you're not offering any opinion today that Blue Cross
20 has failed to do something in that regard, are you?

21 A. No. I'm not saying that they failed.

22 Q. Or that they've been negligent in some fashion in failing
23 to do something in this regard; is that correct?

24 MR. WILSON: Object to the form.

25 BY MS. RICHARD-NELSON:

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1 Q. Are you offering an opinion that Blue Cross has, in any
2 way, been negligent in failing to implement some sort of
3 differential premium?

4 A. What do you mean by negligent?

5 MR. WILSON: Object to the form.

6 BY MS. RICHARD-NELSON:

7 Q. Have they acted without due care?

8 A. I don't know.

9 Q. So you don't have an opinion one way or another on that,
10 do you?

11 A. It's something I just don't know about.

12 Q. No. Because your opinions are focused on what employers
13 might do to mitigate their damages, correct?

14 MR. WILSON: Object to the form.

15 THE WITNESS: That's the focus.

16 BY MS. RICHARD-NELSON:

17 Q. Okay. Look at paragraph 8 with me. Blue Cross and Blue
18 Shield of Minnesota, employers purchasing group health
19 insurance, and the state of Minnesota have all made or could
20 have made choices on how to mitigate the loss costs alleged
21 to arise from employees' use of tobacco. Do you see that?

22 A. Yes.

23 Q. And we've talked about the state of Minnesota and that's
24 contained in paragraph 4 of your opinions, correct?

25 A. Yes.

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1 Q. But we've also talked about the recommendation of Touche
2 Ross in that connection, correct?

3 A. Correct.

4 Q. And we've talked about employers purchasing group health
5 insurance and that's the subject matter of paragraphs 2 and
6 3; is that correct?

7 A. That's correct.

8 Q. Okay. My question to you is: What choices could Blue
9 Cross and Blue Shield of Minnesota have made on how to
10 mitigate the loss costs alleged to arise from their
11 subscribers' use of tobacco that they haven't already done?

12 MR. WILSON: Object to the form.

13 THE WITNESS: They could have imposed
14 differential premiums structures.

15 BY MS. RICHARD-NELSON:

16 Q. I'm sorry.

17 A. They could have had a differential premium structure.

18 Q. In what setting?

19 A. Blue Cross and Blue Shield of Minnesota could have --
20 perhaps I was being too strong in saying imposed. They could
21 have strongly encouraged the employee groups to adopt
22 differential premium structures.

23 Q. Have they done so?

24 A. My understanding is that they've made that product -- or
25 the service available.

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1 Q. Okay. What understanding do you have that Blue Cross and
2 Blue Shield of Minnesota has not made an effort to encourage
3 or incentivize nonsmoking through implementation of
4 differential premiums?

5 A. I'm sorry. One more time.

6 Q. Well, I'm trying to get at -- what I heard you say is
7 that it is your opinion that Blue Cross and Blue Shield of
8 Minnesota could have encouraged employer groups to implement
9 differential premiums. Is that your --

10 A. That's right.

11 Q. Well, did they do so or did they not? And if they
12 didn't, what's the basis for your opinion that they didn't?

13 A. I don't know to what extent that they encouraged
14 differential premiums. My understanding is that they didn't
15 offer or encourage that service at all.

16 Q. And what you do you base that on?

17 A. At a certain point in time prior to '83, I think that it
18 was.

19 Q. Tell me again what your opinion is that before 1983, they
20 didn't offer or encourage differential premiums. Is that
21 your opinion?

22 A. That's right.

23 Q. Do you have any information that they didn't do so after
24 1983?

25 A. I believe that they began working with groups that have

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1 differential premiums subsequent to '83.

2 Q. Do you know at what time?

3 A. No.

4 Q. Do you know whether a group has ever approached Blue
5 Cross and asked for a differential premium and been turned
6 down after 1983?

7 A. I don't know of any groups.

8 Q. Do you know anything about the subject matter of
9 conversations between Blue Cross's marketing department and
10 each of their fully insured groups at any time between 1983
11 and the present on the subject of differential premiums?

12 A. No. I haven't seen anything in that regard.

13 Q. And you would agree with me, would you not, that the
14 decision about whether to implement the differential premiums
15 lies with the employer?

16 A. Yes.

17 Q. Okay. Turning to paragraph 5 of your Basis, Facts and
18 Grounds For Opinion. You say, Many employers require that
19 employees make contributions toward the cost of group health
20 insurance. The Employee Benefits Research Institute reported
21 in the 1990 EBRI Databook on employee benefits that 45
22 percent of workers in medium-sized and large establishments
23 that receive single employee coverage health insurance make a
24 contribution toward the cost of the insurance. Further, 63
25 percent of workers receiving family coverage in those

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1 establishments make a contribution. Did I read that
2 correctly?

3 A. Yes.

4 Q. So, is it my understanding that as of 1990, 55 percent of
5 workers in medium-sized and large establishments make no
6 contribution towards the cost of their insurance?

7 MR. WILSON: Object to the form.

8 THE WITNESS: Did you say in medium-sized
9 and larger?

10 BY MS. RICHARD-NELSON:

11 Q. Yes. According to this data?

12 A. I believe that's correct.

13 Q. What was the level of contribution of employees to their
14 coverage prior to 1990?

15 A. I didn't look at that.

16 Q. Are you aware of the period of time that spans the
17 damages in this case?

18 A. I believe that it's 1978 forward.

19 Q. 1977 forward, possibly?

20 A. Okay.

21 Q. Do you have any information upon the extent to which
22 employees made any contribution to employers and their
23 premium at any time between 1977 and 1990?

24 A. To be exact, the 1990 EBRI Databook.

25 Q. Yes.

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1 A. Was probably reporting numbers from '88.

2 Q. Okay. With the exception of the data reported in
3 paragraph 5, do you have any other information?

4 A. My recollection is that the table in the EBRI Databook
5 reports provides that number for prior years, but I don't
6 recall if that's certain.

7 Q. Is it fair to say that the extent to which employees have
8 contributed to their health insurance has increased over
9 time?

10 A. My guess is that that's correct.

11 Q. What is your understanding about an existence of
12 diagnosis codes at Blue Cross and Blue Shield prior to 1983?

13 A. Can you be more specific?

14 Q. Well, like at paragraph 7 of your report, about halfway
15 down you say, "From 1983 forward reimbursement required that
16 health care providers supply a diagnosis code." What do you
17 base that on?

18 A. I believe that the deposition of Judith Ann Busse --

19 Q. Did you have --

20 A. -- contains that information.

21 Q. Did you have an understanding that what happened in 1983
22 was that the law changed which permitted Blue Cross to enter
23 into a per diem compensation or reimbursement arrangement
24 with hospitals? Do you recall that as part of the Aware
25 program? Or are you not familiar?

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1 A. I'm not very familiar with that.

2 Q. So you don't know what changes may have been made with
3 hospital providers and diagnosis codes in 1983?

4 A. That's right.

5 Q. You don't have any reason to believe that diagnosis codes
6 over time at Blue Cross have been inaccurate, do you?

7 A. I have no idea.

8 Q. Okay.

9 A. I do recall that they became more accurate.

10 Q. You do? What do you base that on?

11 A. The deposition of Judith Ann Busse again.

12 Q. Did you read the final day of that deposition? Do you
13 know -- which was taken sometime subsequent to the first days
14 of the deposition?

15 A. I don't recall whether I did or not.

16 Q. Okay. So it's your understanding based on what you read
17 that Ms. Busse was of the view that over time the diagnosis
18 codes became more accurate or more reliable?

19 A. My recollection is that there was some information being
20 provided by hospitals or doctors that either it was
21 inaccurate or it was not always provided prior to '83.

22 Q. If I told you that prior to '83, the presence of a
23 diagnosis code on the claim form from a hospital or the
24 absence of a diagnosis code on a claim form from a hospital
25 wouldn't panned the claim, would that bring back your memory

1 on whether you're talking about accuracy or reliability?

2 A. What you mentioned sounds familiar.

3 Q. Okay. And you say, Using plaintiff's billing records and
4 information that could have been collected on the smoking
5 status of insureds, Blue Cross and Blue Shield of
6 Minnesota --

7 A. Excuse me. I'm not sure where you're reading from.

8 Q. I'm sorry. I'm at the same place where we were talking
9 about diagnosis codes here.

10 A. In the second paragraph here?

11 Q. Yes.

12 A. Under 7?

13 Q. Yes. It starts, Using plaintiff's billing records.
14 Right there. (Indicating).

15 A. Thank you.

16 Q. Using plaintiff's billing records and information that
17 could have been collected on the smoking status of insureds,
18 Blue Cross and Blue Shield of Minnesota could have calculated
19 the alleged cost of illness attributable to smoking at least
20 since 1983, and you say Busse, possibly since 1980, and you
21 say Zeger, et al, and each year thereafter. Had Blue Cross
22 and Blue Shield chosen to require that health care providers
23 supply diagnosis codes prior to 1983, the alleged cost of
24 illness attributable to smoking could have been calculated
25 for earlier years. How? How would the presence of diagnosis

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1 codes permit Blue Cross to calculate the alleged costs of
2 illness attributable to smoking?

3 A. My recollection from the Busse deposition is that the
4 piece of information that was missing that they needed to do
5 these calculations was provided in '83 and after, and not
6 before then.

7 Q. Let me try it this way: I want you to assume that what
8 happened in 1983, is that in connection with negotiating with
9 hospital providers, hospitals were required, it was no longer
10 optional, to include on the claim form the diagnosis code. I
11 want you to assume that's what happened.

12 A. Okay.

13 Q. Why would that permit Blue Cross to be able to calculate
14 for any given year the alleged cost of illness attributable
15 to smoking?

16 A. My recollection is that in the deposition there was a
17 question as to why these calculations were able to being made
18 after '83. And my recollection is that Judith Ann Busse
19 said, prior to '83 that piece of information wasn't be
20 provided and that afterwards it was, so they were able to
21 make those calculations afterwards.

22 Q. Do you have an understanding that Blue Cross and Blue
23 Shield of Minnesota has ever, prior to the Zeger report, made
24 a calculation as to the alleged cost of illness attributable
25 to smoking?

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1 A. My understanding is that Blue Cross and Blue Shield uses
2 a differential premium structure with some of their groups.

3 Q. Yes.

4 A. And that they do for their own group.

5 Q. Yes.

6 A. And from that I assume that they have made some sort of a
7 calculation in order to determine what those differential
8 premiums should be.

9 Q. And that's an assumption you've made, you haven't seen
10 any facts to support that?

11 A. That's right.

12 Q. So that if I told you that what they did was simply set a
13 bump up in the rate to incentivize nonsmoking, would you have
14 any reason to disagree with that?

15 MR. WILSON: Object to the form.

16 BY MS. RICHARD-NELSON:

17 Q. An additional \$5, an additional \$20?

18 A. Are you saying that that's what they do with all of their
19 groups?

20 Q. I am telling you that -- Well, I am not testifying here.

21 I'm trying to find out what you know. You don't know how it
22 is that Blue Cross calculates its differential premium for
23 any given insured? You know they have an entire group of
24 insureds that have differential premiums?

25 A. I don't know how they do those calculations.

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1 Q. And you don't know how they do it for the groups that
2 have differential premium?

3 A. No.

4 Q. And you don't know how they do it for their internal
5 employees?

6 A. That's right. I don't know how they do it.

7 Q. And you don't know whether the way -- you don't know
8 whether the method of calculating what that premium would be
9 involves the calculation of the alleged cost of illness
10 attributable to smoking, do you?

11 A. No. I don't know.

12 Q. If you look at any given population, any particular
13 group, wouldn't you agree with me that with respect to
14 smoking there's three categories of people. There's
15 nonsmokers, current smokers and former smokers?

16 A. That seems reasonable.

17 Q. Do you have any opinions on how you would account for
18 tobacco attributable health care costs attributable to former
19 smokers?

20 A. No. I have no opinions about that.

21 Q. Paragraph 8 you say, Federal and state of Minnesota laws
22 encourage charging differential premiums or requiring
23 differential employee contribution rates based on tobacco
24 use. In fact, Minnesota insurance statutes specifically
25 state that tobacco use can be used as a rating factor as long

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1 as it is actuarially valid and is approved by the
2 commissioner of insurance. Likewise Section 9802 of the
3 Internal Revenue Code permits employers to provide a premium
4 contribution discount to employees who adhere to programs of
5 health promotion and disease prevention. Did I read that
6 correctly?

7 A. Yes.

8 Q. It is true, is it not, that federal and state of
9 Minnesota laws permit charging differential premiums based on
10 tobacco use; is that correct?

11 A. I believe that is correct.

12 Q. Where in the law do they encourage it?

13 A. My feeling is that since they've specifically permitted
14 it, they're encouraging it.

15 Q. So the fact that it is permissible to charge a
16 differential premium, in your view, means that they're
17 encouraging it?

18 MR. WILSON: Object to the form.

19 THE WITNESS: In this situation when
20 other factors are not permitted, yes.

21 BY MS. RICHARD-NELSON:

22 Q. Okay. Have you had occasion to read the deposition
23 testimony of the actuary at the Department of Commerce of the
24 state of Minnesota who makes the decision about whether to
25 approve differential premiums in any setting?

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1 A. I don't recall reading that.

2 Q. Do you recall what the position is of the state of
3 Minnesota as to whether they encourage charging differential
4 premiums?

5 A. I don't recall.

6 Q. And if the state of Minnesota stated in sworn testimony
7 that it is permissible, but they don't take any position one
8 way or another on it, would you have any reason to disagree
9 with that.

10 A. No.

11 Q. Have you ever had discussion with legislature at the
12 state or federal level to determine what they had in their
13 minds when they permitted differential premiums based on
14 tobacco use?

15 A. No.

16 Q. Now, let's look at paragraph 9 of your
17 opinion. Differential premiums have been charged for
18 different risks for many years. What is the first instance
19 in the state of Minnesota that you're aware of where a
20 differential premium based on smoking was permitted in the
21 health insurance policy?

22 A. I have no idea which --

23 Q. Do you have any --

24 A. -- time was first. I believe that earlier today you said
25 it was with Blue Cross and Blue Shield's plan, but besides

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1 that, I don't know.

2 Q. So you don't know whether such a premium differential
3 existed in any policy prior to 1983, do you, in the state of
4 Minnesota?

5 A. For tobacco use?

6 Q. For tobacco use.

7 A. That's right. I don't know.

8 Q. If you go about halfway down it says, Health insurers
9 today typically charge premiums that depend on such factors
10 as gender, age, occupation, geographic location, health
11 status and income. Do you see that?

12 A. Yes.

13 Q. Do you mean by that that those are underwriting factors?

14 A. Yes.

15 Q. You don't mean by that that health insurers differentiate
16 premiums in a group setting by gender, age, occupation,
17 income and the like, do you?

18 A. In a group setting?

19 Q. Yes.

20 A. There are typically adjustments for some of these
21 factors.

22 Q. It's your testimony that in an employer group that it is
23 typical for there to be premium differences as among the
24 employees based on these factors?

25 A. Between the different employees within a particular

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1 group?

2 Q. Yes. That's what I'm talking about. Differential
3 premiums.

4 A. Typically, no. What I was referring to is if you have a
5 manually-rated group, there is an adjustment if the
6 particular employer group differs from the book.

7 Q. These are factors used at the underwriting stage to set
8 the rate for a group, right?

9 A. Right.

10 Q. And once the rate is set, it is truly atypical, if not
11 unheard of, for an employer to differentiate premiums as
12 among employees based on gender, age, occupation, geographic
13 location, health status and income; is that correct?

14 MR. WILSON: Object to the form.

15 THE WITNESS: It's not unheard of.

16 BY MS. RICHARD-NELSON:

17 Q. Can you tell me a single instance in the state of
18 Minnesota where an employer differentiates premiums in its
19 group based on one of those factors apart from smoking?

20 A. In the state of Minnesota?

21 Q. Yes. And I'm not talking about dependent coverage now
22 either, I'm talking about these factors in a group setting?

23 A. In the state of Minnesota, I can't.

24 Q. You testified earlier that there were three ways that
25 differential premiums could reduce the health care costs --

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1 or the tobacco attributable portion of the health care costs
2 that Blue Cross pays its providers. I believe you talked
3 about incentivizing nonsmoking, about employees going to
4 different groups, or employees not opting for the group
5 insurance. Do you recall that testimony?

6 A. Yes.

7 Q. Are you aware that Blue Cross and Blue Shield of
8 Minnesota is a nonprofit health care services plan?

9 A. That was my understanding.

10 Q. And have you ever read its enabling legislation?

11 A. No. I haven't.

12 Q. Do you have any idea what its mission is?

13 A. Not specifically.

14 Q. Do you have an understanding that its mission is to
15 provide quality health care coverage at the lowest cost to as
16 many citizens of the state of Minnesota as possible?

17 A. I wasn't aware that that's its mission statement.

18 Q. Do you believe that it would be consistent with that
19 mission to encourage employer groups to differentiate their
20 premium based on smoking, the result of which would be to
21 encourage employees to go outside of Blue Cross to other
22 plans or to be not insured at all?

23 MR. WILSON: Object to the form.

24 THE WITNESS: It may.

25 BY MS. RICHARD-NELSON:

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1 Q. It may be consistent with its mission to do that?

2 A. Yes.

3 MR. WILSON: Object to the form.

4 BY MS. RICHARD-NELSON:

5 Q. Are you aware of a gentleman by the name of Mr. Green?

6 A. I know several Mr. Greens. I don't know which particular
7 one.

8 Q. Mr. George Green who is testifying on behalf of the
9 tobacco company -- tobacco companies in this litigation?

10 A. No. I am not familiar with that individual.

11 Q. So you're -- I presume you've not read his deposition?

12 A. No. I haven't.

13 Q. Have you been told that the tobacco industry retained an
14 expert who intends to offer the opinion that the shift from
15 community rating to experience rating is a departure from
16 Blue Cross's mission, because experience rating results in
17 higher premiums for certain subscribers and not for others?

18 A. No. I wasn't told that.

19 Q. Were you told that Mr. Green testified that a
20 differential premium based on smoking would be a departure
21 from Blue Cross's mission?

22 A. No. I wasn't told that.

23 Q. Have you spoken with any other experts that the
24 defendants have retained in this case?

25 A. No. I haven't. Not that I know of. I have spoken with

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1 Kip Viscusi, but I didn't know he was an expert in this case
2 until this morning.

3 Q. So, I can assume from that, that in your discussion, you
4 didn't talk about this case?

5 A. That's correct.

6 MS. RICHARD-NELSON: Why don't we take
7 five minutes.

8 (Whereupon, a recess had.)

9 BY MS. RICHARD-NELSON:

10 Q. Let's turn for a moment, Mr. Browne, to paragraph 11 of
11 your report. Paragraph 11 you refer to a 1992 Milliman-
12 Robertson paper called Study of Healthy Lifestyle Premium
13 Reductions for the Minnesota Department of Commerce. What is
14 your understanding of the reason Milliman, Robertson prepared
15 that paper for the Department of Commerce?

16 A. I believe at the time the Department of Commerce was
17 interested in promoting healthy lifestyle behaviors.

18 Q. Where did you get that from?

19 A. Just a general reading of it. I may be way off.

20 Q. Were you aware that at or about that time legislation in
21 the Minnesota -- legislation came down in the state of
22 Minnesota called the Minnesota Care legislation?

23 A. That does sound somewhat familiar now that you mention
24 it.

25 Q. Are you aware of whether the legislature asked the

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1 Department of Commerce to have an actuarial study done on
2 premium discounts and healthy lifestyles? Does this ring a
3 bell?

4 A. It does ring a bell.

5 Q. Is that your memory?

6 A. It's my refreshed memory.

7 Q. Do you now have any recollection that the Department of
8 Commerce was promoting healthy lifestyles at the time?

9 A. That may be a mischaracterization.

10 Q. Do you know who Mr. Cumming is?

11 A. No.

12 Q. Do you recognize that he was an author of that report?

13 A. Yes.

14 Q. Do you know that he's been deposed in this case?

15 A. I did not know that.

16 Q. So you have not reviewed his deposition?

17 A. No. I haven't.

18 Q. You state here that the report recommends that premium
19 discounts for healthy lifestyle behavior be voluntary. Do
20 you see that?

21 A. Yes.

22 Q. And so the Milliman and Robertson paper does not
23 recommend that they be mandatory, does it?

24 A. That's right.

25 Q. Have you ever seen a recommendation by any actuary that

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1 premium discounts for healthy lifestyle behavior in any
2 setting be mandatory?

3 MR. WILSON: Object to the form.

4 THE WITNESS: Not that I recall.

5 BY MS. RICHARD-NELSON:

6 Q. You go on to say that, The author states that, quote, if
7 physical exam results and blood tests are used, we believe
8 that insurers can reasonably monitor compliance of weight,
9 cholesterol, hypertension, and tobacco use. Do you see that?

10 A. Yes.

11 Q. Are you aware of an expressed concern by employers that
12 monitoring tobacco use among its employees is unwieldy?

13 A. No. I'm not aware of it.

14 Q. Are you aware of any physical exam results or blood tests
15 which test for the presence of tobacco use?

16 A. I'm not aware of particular tests.

17 Q. Okay. Weight can be measured by a scale, correct?

18 A. Yes.

19 Q. Cholesterol and hypertension can be medically measured,
20 can they not?

21 A. That's my understanding.

22 Q. And do you have any understanding whether there are blood
23 tests available or physical exam results which would
24 demonstrate whether or not somebody uses tobacco?

25 A. From the report I infer that that's true.

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1 Q. They are actuaries, are they not?

2 A. I assume that that's true. That they are actuaries.

3 Q. And as actuaries they have an understanding as to whether
4 or not there are physical exam results or blood tests that
5 can be used to determine tobacco use?

6 MR. WILSON: Object to the form.

7 THE WITNESS: I can only assume that
8 they've encountered such exams if they wrote that. I don't
9 know otherwise.

10 BY MS. RICHARD-NELSON:

11 Q. But you're relying on that report for that statement, are
12 you not?

13 A. Yes.

14 Q. Wouldn't you agree with me that tobacco users sometimes
15 quit and start up again and quit again and start up again?

16 MR. WILSON: Object to the form.

17 THE WITNESS: Some quit forever.

18 BY MS. RICHARD-NELSON:

19 Q. That's true. And some quit and start up again, don't
20 they?

21 A. That's right.

22 Q. Do you have any understanding as to any concern on the
23 part of employers that monitoring who is currently using
24 tobacco use among their -- who is currently using tobacco
25 among their employees might be difficult to do?

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1 MR. WILSON: Object to the form.

2 THE WITNESS: I'm not aware of those
3 objections.

4 BY MS. RICHARD-NELSON:

5 Q. You didn't see that expressed in the 1992 report?

6 A. I'm sitting here right now, I don't recall that. I may
7 have read it in June.

8 Q. Okay. Paragraph 12 says, Numerous companies and public
9 employers currently charge differential premium rate
10 contributions for group health insurance. But as you sit
11 here today, can you identify any of those companies or public
12 employers in the state of Minnesota with the exception of the
13 employers identified in Ms. Busse's deposition who have
14 purchased their coverage from Blue Cross and Blue Shield of
15 Minnesota?

16 A. Who charged differential?

17 Q. Yes.

18 A. No. I can't.

19 Q. You say the state of South Dakota requires that employees
20 who smoke make a greater contribution toward the cost of
21 their health insurance than employees who do not smoke. Do
22 you know whether the state of Minnesota does that to
23 incentivize nonsmoking?

24 MR. WILSON: Object to the form.

25 THE WITNESS: Would you rephrase that.

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1 BY MS. RICHARD-NELSON:

2 Q. Do you know whether the state of South Dakota requires
3 that employees who smoke make a greater contribution of their
4 premium than employees who do not smoke as an effort to
5 incentive nonsmokers?

6 A. I don't know the reasons why South Dakota does that.

7 Q. Do you know whether the premium that they charge their
8 employees who smoke is based on an actuarial calculation of
9 the health care costs attributable to smokers in that group?

10 A. I don't know how they calculate those premiums.

11 (Defendants' Exhibit 4210 was
12 marked for identification.)

13 BY MS. RICHARD-NELSON:

14 Q. Show you what's been marked as Defendants' Exhibit 4210.

15 Do you see that document?

16 A. Yes.

17 Q. Do you recognize this document?

18 A. I've seen several documents like this. This may be one
19 of them.

20 Q. Is this a document, indeed, that your counsel provided to
21 me stating that you are relying on this document in
22 formulating your opinions?

23 MR. WILSON: I don't think that's what I
24 said.

25 MS. RICHARD-NELSON: You don't? You

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1 think you said he reviewed it?

2 MR. WILSON: I said reviewed it.

3 MS. RICHARD-NELSON: I don't think so.

4 BY MS. RICHARD-NELSON:

5 Q. Did you review or rely on this document in formulating
6 your opinion?

7 A. If this is the document that I received from counsel
8 since my report, then I didn't rely on it when I wrote my
9 report. Although I believe --

10 Q. Is this a document you received from counsel?

11 A. I believe that it is. As I said, there are several
12 different reports that are like this, some of which I found
13 through my own research in the business library at Madison.

14 Q. Okay. Well, let's take a look at this report. This is
15 the Hewitt Associates report called Health Promotion
16 Initiative/Managed Care Provided by Major U.S. Employers in
17 1996. Based on Practices of 1,050 employers. Is that
18 correct?

19 A. Yes.

20 Q. If you turn to the first page marked Summary, do you see
21 that?

22 A. Yes. I do.

23 Q. This is a discussion of employer-based initiative, is it
24 not?

25 A. That seems to be true, yes.

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1 Q. If you look at the next page there's a chart on the next
2 page?

3 A. Yes.

4 Q. And the chart discusses different employer-based
5 initiatives including education/training, health risk
6 appraisals, health risk assessments, incentives/disincentives
7 and others. Do you see that?

8 A. Yes.

9 Q. Okay. Do you recall that one of the
10 incentives/disincentives discussed in this report is the
11 implementation by an employer of a differential premium in
12 its group based on unhealthy lifestyles?

13 A. That does sound correct.

14 Q. This report considered 1,050 employers, did it not?

15 A. Yes.

16 Q. And in 1996, 89 percent of those had some sort of
17 managed-health initiatives in place, do you recall that? If
18 you look at the second paragraph of the summary.

19 A. Yes.

20 Q. Now of those 89 percent, 39 percent had some sort of an
21 incentive or disincentive in their health care plan design,
22 do you see that?

23 A. Yes.

24 Q. And that was true in 1996. In 1992, if you turn to the
25 chart, only 14 percent had an incentive or disincentive in

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1 their health care plan design, do you see that?

2 A. Yes.

3 Q. Do you know what it was prior to 1992?

4 A. No. I don't.

5 Q. Do you know what it was all the way back to 1977?

6 A. No. I don't.

7 Q. Wouldn't you agree with me that this report certainly
8 suggests that there had been a dramatic increase in the
9 incidents of employers choosing to have incentives or
10 disincentives to encourage healthy lifestyles in very recent
11 years, the last few years?

12 MR. WILSON: Object to the form.

13 THE WITNESS: There has been a great
14 increase in the past several years.

15 BY MS. RICHARD-NELSON:

16 Q. And the numbers of employers, for instance, in 1992 that
17 had such a plan were fairly small, were they not?

18 MR. WILSON: Object to the form.

19 BY MS. RICHARD-NELSON:

20 Q. In fact, there were 14 percent of employers at that time?

21 MR. WILSON: Object to the form.

22 BY MS. RICHARD-NELSON:

23 Q. That were considered in this study.

24 MR. WILSON: Object to the form.

25 THE WITNESS: If this is a representative

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1 survey.

2 BY MS. RICHARD-NELSON:

3 Q. Okay. In paragraph 12 of your report you talk about the
4 1995 Hey/Huggins Benefits Report. Do you recall that?

5 A. Okay.

6 Q. And that's a report that you relied on in your -- in
7 offering your opinion, did you not?

8 A. I relied on what the Bureau of National Affairs reported
9 about that report.

10 Q. So you didn't read the report itself?

11 A. That's right.

12 Q. If we can believe the Bureau of National Affairs,
13 apparently, they reported that seven percent of 177 employers
14 responding to a survey indicated that they had an additional
15 premium to medical plan costs of employees or spouses who
16 smoked in 1995; is that correct?

17 A. That's correct.

18 Q. Do you have any idea what it was before 1995? Was it
19 less than seven percent?

20 A. Of those 177 companies?

21 Q. Yes.

22 A. I don't know what percent of those --

23 (Whereupon, Reporter interruption.)

24 A. 177 companies.

25 Q. Can you give me any information, Mr. Browne, between 1977

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1 and 1996 of the frequency or the percentage of fully insured
2 groups in the state of Minnesota that employed a differential
3 premium based on smoking?

4 A. I don't know how many firms, how many groups, did that.

5 Q. Do you know whether during the 1970's any employers did?

6 A. I don't know.

7 Q. Do you know whether in the 1980's any employers did?

8 A. Just what we've talked about previously.

9 Q. Okay. On the next page of your report you state that you
10 may supplement your report with additional information that
11 may become available. Has any additional information come
12 available to you since the end of June of 1997?

13 A. I believe this is a report.

14 Q. Defendants' Exhibit 4210 has come to your attention?

15 A. I believe that's right if I have that straight.

16 Q. And that came to your attention through your counsel?

17 A. And one other thing. I received an E-mail message that
18 the state of Kansas, similar to the state of South Dakota,
19 imposes differential premiums for tobacco use.

20 Q. In 1997?

21 A. That it currently does.

22 Q. Do you have any information about the state of Kansas
23 before 1997?

24 A. Not that I recall at this time.

25 Q. Do you have any information about the basis for

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1 calculating that premium?

2 A. No. I don't.

3 Q. Do you know if it has anything to do with the tobacco
4 attributable health care costs?

5 A. I don't know how they do it.

6 Q. Apart from your information on the state of Kansas in
7 1997 and the Hewitt report that you just showed me, which is
8 Defendants' Exhibit 4210, has any additional information come
9 to your attention since the end of June of 1997?

10 A. Not that I recall.

11 Q. Do you have any plans, as you sit here today, to
12 supplement your report or are there additional areas you
13 intend to research?

14 A. There's nothing except what we've talked about.

15 Q. Are you aware that as a result of the 1992 Minnesota Care
16 legislation that the legislature requested that certain
17 agencies of the state of Minnesota make a recommendation to
18 the legislature about whether to implement a differential
19 premium based on smoking in the Minnesota Care program?

20 A. Is that what we were discussing earlier that resulted in
21 the Bloom report?

22 Q. Well, no, not really. There was Minnesota Care
23 legislation, part of that legislation was a program called
24 Minnesota Care which was designed to provide insurance to
25 previously uninsured people?

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1 A. Okay. I'm not aware of that.

2 Q. You're not aware of the Minnesota Care welfare program,
3 if you will?

4 A. That's right. I have very limited, if any, knowledge
5 about it.

6 Q. Do you have any information about whether there was a
7 recommendation made to the Minnesota legislature about the
8 implementation of a differential premium in that program?

9 A. Not that I recall.

10 Q. And I presume you have no information about the Minnesota
11 legislature's decision in that regard?

12 A. That's right.

13 Q. Do you have any recollection of hearing any discussion
14 about a concern on the part of the Minnesota legislature that
15 by pricing smokers out of the market they were defeating
16 their purpose of insuring the sickest, poorest people of this
17 state?

18 MR. WILSON: Object to the form.

19 THE WITNESS: I'm not familiar with those
20 discussions.

21 BY MS. RICHARD-NELSON:

22 Q. Are you aware of how the Blue Cross and Blue Shield of
23 Minnesota's internal premium differential based on smoking
24 works? In other words, the premium differential that Blue
25 Cross and Blue Shield of Minnesota has among its own

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1 employees?

2 A. What do you mean by how it works?

3 Q. What contribution schedule has been set up?

4 A. I don't know what that is.

5 Q. And you don't know what it's based on either, do you?

6 A. No.

7 Q. The calculation of the contribution?

8 A. No. I don't know how they do the calculation.

9 Q. But apart from whether you know how to do the
10 calculation, you don't know whether it's based on tobacco
11 attributable health care cost?

12 A. I'm sorry.

13 Q. You don't know whether the calculation of that premium
14 differential is based on a calculation of tobacco
15 attributable health care costs?

16 A. I don't know how they do it.

17 Q. Just so I understand your opinions in this case, my
18 understanding is that you have an opinion that employers
19 could have mitigated their -- employers could mitigate their
20 premium burden by shifting that premium burden to smokers in
21 their employee population; is that correct?

22 A. They could have charged the smokers in their population.

23 Q. Okay. And that the institute -- another opinion of yours
24 is that the institution of a differential premium in any
25 setting has -- could have the effect of incentivizing

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1 nonsmoking; is that correct?

2 A. Yes.

3 Q. It could have the effect of discouraging employees from
4 remaining at that employer and going elsewhere?

5 A. It could.

6 Q. And it could have the effect of encouraging employees not
7 to take health insurance?

8 A. That's right.

9 Q. What other opinions do you intend to offer in this case
10 other than those?

11 A. The opinions that I've listed in the report.

12 Q. But tell me, apart from reading them, what other opinions
13 are there other than those that I've just mentioned?

14 A. Apart from those would be the opinions in the report.

15 Q. But what opinions are in the report apart from what I've
16 mentioned?

17 MR. WILSON: Object to the form.

18 BY MS. RICHARD-NELSON:

19 Q. I don't understand what additional opinions you have over
20 and above the opinions I just stated?

21 MR. WILSON: Object to the form.

22 BY MS. RICHARD-NELSON:

23 Q. What opinions, for instance, do you have about Blue Cross
24 and Blue Shield of Minnesota?

25 A. Well, that if they were developing the premiums for the

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1 groups in accordance with standard actuarial practices, that
2 the premiums would have been sufficient if properly
3 calculated to pay the health care costs that arise from use
4 of tobacco, if any.

5 Q. Let's just stop there for a moment just so we're on the
6 same wave length. What you're saying is that within the
7 employer group that the employer could rid himself of the
8 premium burden of tobacco-related costs by shifting it to the
9 employee, is that what you're saying? That you could
10 calculate a premium that the employee would have that would
11 relieve the employer of the burden of those -- that premium;
12 is that correct?

13 A. That's right. That that's calculable.

14 Q. How does that have anything to do with the mitigation of
15 Blue Cross's damages, Blue Cross's damages being the tobacco
16 attributable health care costs they're paying to their
17 providers?

18 A. Well, if Blue Cross is developing the premiums that are
19 being charged the employers and the premiums are higher, if
20 they are higher because of tobacco use, then that creates an
21 incentive for the employers to encourage their employees not
22 to smoke.

23 Q. Okay. So if I understand you right, and I thought I
24 already went through this, but let's try to go through
25 carefully. One of your opinions is that if an employer wants

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1 a differential premium and comes to Blue Cross, and Blue
2 Cross cooperates and helps out, that the result of that
3 differential premium might be to incentivize nonsmoking. Do
4 we agree that that's one of your opinions?

5 A. Yes.

6 Q. And do we agree that another opinion is that another
7 result of the employer making the decision to institute that
8 differential premium is that some smoking employees might
9 leave his employment?

10 A. Yes.

11 Q. And that another is that some smoking employees may
12 choose not to have health care coverage?

13 A. That's correct.

14 Q. Okay. And then another opinion is that within the
15 employer group that the employer could shift its premium
16 burden to its smoking employees if it chose to do so?

17 A. Yes.

18 Q. But in the absence of incentivizing nonsmoking or ridding
19 the group of smokers, that's not going to affect the tobacco
20 attributable health care costs that Blue Cross pays, is it?

21 MR. WILSON: Object to the form.

22 THE WITNESS: The premium that Blue Cross
23 and Blue Shield charges to the group, if higher because of
24 tobacco use, would provide an incentive to the employer,
25 apart from any incentive that the employees may have, to

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1 encourage employees not to use tobacco.

2 BY MS. RICHARD-NELSON:

3 Q. Well, the premium that is charged to the employer group
4 is what it is, right? And it includes the experience of that
5 group and if it includes smoking-related diseases, it
6 includes that, correct?

7 A. That's correct.

8 Q. Okay. So if -- are you saying that employers who
9 acknowledge that their premium burden includes
10 smoking-related diseases can relieve themselves of the burden
11 by shifting some of that premium to their smoking employees;
12 is that right?

13 A. Even if they choose not to do that. If the premium that
14 the employer bears is higher.

15 Q. Yes.

16 A. Because of tobacco use.

17 Q. Yes.

18 A. Then the premium may have an incentive that the employer
19 feels in order to -- that would encourage the employer to
20 encourage the employees not to smoke.

21 Q. So, in other words, if an employer understands that the
22 premium it pays includes the entire experience of the group,
23 including smoking-related diseases, employers may feel an --

24 (Reporter interruption.)

25 Q. An incentive to educate employees that smoking -- all

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1 employees that smoking causes increased health care costs?

2 A. That's correct.

3 Q. But does any of this have the effect of reducing what

4 Blue Cross pays to its providers by way of reimbursement?

5 Isn't it true that that amounts of money -- that money

6 doesn't get reduced until we reduce the tobacco consumption

7 and we reduce tobacco disease?

8 MR. WILSON: Object to the form.

9 THE WITNESS: I'm sorry. Could you --

10 BY MS. RICHARD-NELSON:

11 Q. Isn't it true that the amount of tobacco attributable

12 health care costs that Blue Cross pays to its providers isn't

13 going to get reduced one penny until we reduce tobacco

14 attributable disease and tobacco consumption?

15 MR. WILSON: Object to the form.

16 THE WITNESS: Not necessarily. You could

17 change the provisions of the insurance policy.

18 BY MS. RICHARD-NELSON:

19 Q. Excuse me.

20 A. You could change the provisions of the insurance policy.

21 Q. In what way? How would that reduce the tobacco

22 attributable health care costs?

23 A. I thought that you were asking me the tobacco attributed

24 health care costs that Blue Cross and Blue Shield is paying

25 to their providers.

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1 Q. Right. How do you get those to go down? If you have a
2 thousand dollars of those in a year, how do you get that to
3 go down?

4 A. Well, you could write a policy that had a different
5 deductible or a different coinsurance or had a policy limit
6 or that excluded coverage for certain conditions.

7 Q. Can you write a policy of health insurance in the state
8 of Minnesota that excludes any coverage for smoking-related
9 disease?

10 MR. WILSON: Object to the form.

11 THE WITNESS: I don't know.

12 BY MS. RICHARD-NELSON:

13 Q. Are you aware of mandated benefits under state law?

14 A. I'm aware of mandate benefits. I don't know what they
15 all are in Minnesota.

16 Q. Do you understand that it is Blue Cross's mission to
17 provide health care to everyone whether they have red hair or
18 black hair or smoke or don't smoke or tall or short?

19 MR. WILSON: Object to the form.

20 THE WITNESS: That's what you represented
21 to me earlier.

22 BY MS. RICHARD-NELSON:

23 Q. Yes. And that Blue Cross has in its power the ability to
24 enter into cost containment initiatives like the ones we
25 discussed earlier: pre-admission approval, pre-term birth

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1 interventions and the like, that will have as one of their
2 consequences the reduction of health care costs; isn't that
3 correct?

4 A. That they engage in those?

5 Q. Yes.

6 A. And it reduces health care costs?

7 Q. Yes.

8 A. I believe so.

9 Q. But whether or not an employer chooses to differentiate a
10 premium among its employees is not going to impact the
11 tobacco attributable health care costs that Blue Cross pays
12 unless that program incentivizes people to stop smoking or
13 drives smokers away?

14 MR. WILSON: Object to the form.

15 THE WITNESS: I believe that's what we
16 earlier said.

17 BY MS. RICHARD-NELSON:

18 Q. Okay. Let's take a look at some documents. Earlier, Mr.
19 Browne, we marked a series of articles, Defendants' Exhibits
20 4203, 4201, 4202 and 4204 and 4205. I would like you to take
21 each of these articles and tell me in what way you view these
22 articles as being in some way relevant to this litigation.

23 Tell me the first articles that you're going to start with.

24 A. Okay. I'll start with Evidence of Adverse Selection in
25 the Individual Health Insurance Market.

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1 Q. Okay.

2 A. In this article I tested various economic theories of
3 market equilibrium when information is asymmetric.

4 Q. And what does that mean?

5 A. That means the information available to different market
6 participants is not the same.

7 Q. And how does that have to do with this litigation?

8 A. Information is asymmetric in markets if there's little
9 underwriting or not sufficient underwriting for the insurer
10 to have as much knowledge about the risk as the insured.

11 Q. And do you have any reason to believe that that's true
12 with Blue Cross and Blue Shield of Minnesota in this case
13 with the fully insured groups that form the basis of the
14 damages for them in this case?

15 A. Could you rephrase that? I'm not sure exactly what
16 you're asking me.

17 Q. Well, I'm asking you how the work that you're doing on
18 this article has something to do with Blue Cross and Blue
19 Shield of Minnesota and the fully insured groups in this
20 litigation?

21 A. In a broad sense it has to do with underwriting and the
22 use of information to classify risks.

23 Q. Is there anything in this article that deals with smoking
24 as a risk?

25 A. I don't know.

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1 Q. Would you take a moment to look?

2 A. Sure. Not specifically.

3 Q. Generally?

4 A. There's some information that I use and some of the
5 regressions that has to do with perceived health status.

6 Q. Apart from that?

7 A. There's also information about whether individuals have
8 an activity limitation. But aside from that, no.

9 Q. And this article is published in the Journal of Risk and
10 Insurance; is that correct?

11 A. That's correct.

12 Q. And it was peer reviewed?

13 A. Yes.

14 Q. And you relied in this article, did you not, on the
15 National Medical Care Expenditure Survey?

16 A. Yes.

17 Q. And you found that survey to be reliable, did you not?

18 A. For my purposes.

19 Q. And when it was peer reviewed nobody questioned the
20 reliability of that survey, did they?

21 A. No.

22 Q. What is the National Medical Care Expenditure Survey?

23 A. It's a survey that's done roughly every ten years that
24 asks individuals about the sources of their health insurance,
25 characteristics of their health insurance policies and

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1 demographic information.

2 Q. And which year's survey did you rely on in this article?

3 A. The 1977 survey.

4 Q. Has the survey been done subsequent to 1977?

5 A. Yes.

6 Q. What years was it done?

7 A. 1987.

8 Q. When was this article published in the Journal of Risk
9 and Insurance? Is it in March of 1992?

10 A. That's right.

11 Q. Why did you not rely on the 1987 survey?

12 A. Because it wasn't available for my use when I was writing
13 my dissertation.

14 Q. Subsequent to 1992, have you had occasion to rely on the
15 1987 survey?

16 A. One of my students used it in a class I taught.

17 Q. Okay. And did you advise the student that would be a
18 reliable survey for him or her to use?

19 A. We didn't talk about the reliability of the data.

20 Q. Okay. Did you express any concern to the student that he
21 or she shouldn't rely on the survey because of reliability?

22 A. No. I didn't.

23 Q. Do you have any knowledge about any concerns with that
24 survey?

25 A. I don't.

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1 Q. You view it as reliable?

2 MR. WILSON: Object to the form.

3 THE WITNESS: I've never investigated
4 whether it's reliable or not. I've always assumed that it's
5 reliable.

6 BY MS. RICHARD-NELSON:

7 Q. And National Medical Care Expenditures Survey asks
8 participants if they perceive their health status to be
9 excellent, good, fair or poor, does it not?

10 A. Yes.

11 Q. And you view that survey methodology as reliable?

12 MR. WILSON: Object to the form.

13 THE WITNESS: For my purposes it was.

14 BY MS. RICHARD-NELSON:

15 Q. Okay. What is the next article?

16 A. The next article is Asymmetric Information and the Demand
17 for Medigap Insurance.

18 Q. And how is that article relevant to this litigation or
19 potentially is?

20 A. In the same way that the previous article was.

21 Q. Do you rely on the National Medical Care Expenditure
22 Survey in the article entitled Asymemetric Information and
23 the Demand for Medigap Insurance?

24 A. I believe that we did use NMCES in that study as well.

25 Q. And that's a peer reviewed study?

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1 A. Yes. It is.

2 Q. Nobody challenged the reliability of that survey, did
3 they?

4 A. No.

5 Q. Okay. The next article?

6 A. Information Asymmetries and Adverse Selection in the
7 Market for Individual Medical Expense Insurance. Again, I
8 feel it has similar reasons for being relevant as with the
9 previous two articles.

10 Q. But this articles applies to the individual market, does
11 it not?

12 A. Yes. It does. And so did the first article that we
13 discussed.

14 Q. And, again, in this article you relied on the National
15 Medical Care Expenditure Survey?

16 A. Yes.

17 Q. Any other relevance?

18 A. No.

19 Q. The next article?

20 A. State restriction on Health Insurance Underwriting
21 Criteria: The Effect on the Uninsured Population.

22 Q. Okay.

23 A. What I did in this study was tested whether the state
24 laws that prohibit certain types of underwriting have an
25 effect on the overall level of uninsurance in the state.

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1 Q. How would that be applicable to this case?

2 A. Prohibitions on underwriting criteria in theory tend to
3 create more of an asymmetric information environment and more
4 of an adverse selection problem. So this paper would have
5 similar relevance to the preceding ones.

6 Q. Wouldn't you agree with me that if all Blue Cross and
7 Blue Shield fully insured local plans incorporated a
8 differential premium that we would have on our hands an
9 adverse selection problem in the state of Minnesota?

10 MR. WILSON: Object to the form.

11 BY MS. RICHARD-NELSON:

12 Q. There might be significant numbers of employees choosing
13 to go to other insurance?

14 MR. WILSON: Object to the form.

15 BY MS. RICHARD-NELSON:

16 Q. And those employees would be smokers?

17 MR. WILSON: Object to the form.

18 THE WITNESS: That's not adverse
19 selection.

20 BY MS. RICHARD-NELSON:

21 Q. That's not adverse selection for a group of high risk
22 employees to select a health care plan?

23 A. What you just described?

24 Q. Yes.

25 A. Is not what I would refer to as adverse selection.

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1 Q. Let's suppose there were one carrier in the state of
2 Minnesota that did not write insurance for groups that would
3 include a differential premium and all the other carries did
4 based on smoking, would it not be a concern that the smokers
5 of the state of Minnesota who are employed would flock to the
6 carrier who wrote the insurance without the differential
7 premium?

8 A. The smokers in theory would do that.

9 Q. Yes.

10 A. Now whether that's a concern is another question.

11 Q. From an insurance standpoint, it would be a concern,
12 wouldn't it?

13 MR. WILSON: Object to the form.

14 THE WITNESS: To who?

15 BY MS. RICHARD-NELSON:

16 Q. To the employer and the carrier who were involved in the
17 plan that didn't have the differential premium? They'd have
18 significantly higher health care costs?

19 MR. WILSON: Object to the form.

20 BY MS. RICHARD-NELSON:

21 Q. If they were insuring the employed smokers of Minnesota?

22 A. That's right.

23 MR. WILSON: Object to the form.

24 BY MS. RICHARD-NELSON:

25 Q. You can answer the question.

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1 A. They would raise their premium accordingly to reflect
2 their risk.

3 Q. Right. But the health care attributable -- the tobacco
4 attributable health care cost would be very significant for
5 that group, wouldn't it? Would it not?

6 MR. WILSON: Object to the form.

7 THE WITNESS: If we assume that these
8 costs are real, which we will for the sake of discussion. I
9 think that's what you want to do.

10 MS. RICHARD-NELSON: (Nodding).

11 THE WITNESS: Then what you would have is
12 a separating equilibrium in the market, I believe, where
13 different risks were purchasing different policies at
14 different prices.

15 BY MS. RICHARD-NELSON:

16 Q. Okay. I believe you were in the midst of telling me
17 about the article State Restrictions on Health Insurance
18 Underwriting Criteria; is that correct?

19 A. That's right. We talked about that. I don't know if you
20 have any additional questions.

21 Q. Is there anything else about the article that would be
22 relevant to this case?

23 A. I don't believe so.

24 Q. The next article?

25 A. Explaining Insurance Policy Provision via Adverse

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1 Selection. This is a highly theoretical article that deals
2 with insurance policy design when information in the market
3 is asymmetric.

4 Q. Does it have any relevance to this case?

5 A. Only in a very general sense.

6 Q. And what would that be?

7 A. That it has to do with the effects of information
8 asymmetries in markets.

9 Q. Mr. Browne, you don't have an opinion, do you, one way or
10 another, as to whether the smokers of the state of Minnesota
11 should bear the premium burden for smoking attributable
12 health care costs, do you?

13 A. Do I have an opinion?

14 Q. Yes. Do you have an opinion?

15 A. Well, I have a gut feeling if that qualifies as an
16 opinion.

17 Q. Well, why don't we hear your gut feeling on it?

18 A. I feel that if the smokers bear any such costs that there
19 may or may not be, that that would provide an economic
20 incentive for them to not smoke. And if their health is
21 worse off because they do smoke, I think that it would be
22 better to have them being healthy.

23 Q. Sure. But that's not my question. Do you think that the
24 smokers of the state of Minnesota should bear the entire
25 premium burden of tobacco attributable health care costs?

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1 A. I don't see how that's different from my answer. I'm
2 missing the distinction you're trying to make.

3 Q. Well, are you rendering an opinion in this case about
4 whether smokers should take responsibility in some way for
5 health care costs attributable to that behavior?

6 A. I wasn't asked to make or draw an opinion of that nature.

7 Q. So you have no opinion on that question; is that correct?

8 A. Not in this case.

9 Q. Do you have an opinion in another case?

10 A. No.

11 Q. Do you think that, similarly, alcohol attributable health
12 care costs should be borne by those who drink, cholesterol
13 attributable health care costs should be borne by those who
14 eat fatty foods? Where do you draw the line?

15 A. You're asking me in this case or just general?

16 Q. In this case.

17 A. Well, I haven't been asked to form any opinions about
18 that in this case.

19 Q. Well, then, generally, do you think that we all ought to
20 be assessed for our own given risks and bear our own health
21 care costs? Is it consistent with the notions of group
22 insurance?

23 A. That's a different question.

24 Q. Okay. Well, let's start with the first question. Is it
25 your view that each and ever one of us should bear our own

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1 health care costs resulting from our own particular risks?

2 A. There are different types of risks. There are some that
3 are genetic, some that are behavioral.

4 Q. Some that are voluntary, some that are not?

5 A. That's another way of putting it, yes.

6 Q. For instance, wearing a seat belt, that's a voluntary
7 risk, is it not?

8 A. Yes.

9 Q. Failure to wear a seat belt is a voluntary risk?

10 A. For most people, sure.

11 Q. Do you have an opinion as to whether smoking tobacco is a
12 voluntary risk, or are you not an expert on addiction?

13 A. I am not.

14 MR. WILSON: Objection to the form.

15 THE WITNESS: I'm not an expert on
16 addiction.

17 BY MS. RICHARD-NELSON:

18 Q. Is it consistent with fundamental notions of group
19 insurance that we would assess the risks of every individual
20 in a particular group and charge them a premium based on
21 their risks?

22 A. That hasn't been a practice.

23 Q. But is it consistent with policy behind pooling risks in
24 group insurance?

25 A. I wouldn't say that it's inconsistent to charge different

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1 risks in a group differently based on the risks that they
2 undertake. I don't think that that's inconsistent with the
3 notion of group insurance.

4 Q. Are you aware of any group insurance anywhere in this
5 country which implements a differential premium based on
6 multiple risks within a single employer group?

7 A. Such as alcohol use and tobacco at the same time?

8 Q. Seat belt use, cholesterol use and any other behaviors?

9 A. I do have a recollection back in June of reading of
10 companies that have several different health incentive
11 activities that are applicable to the group insurance premium
12 contribution rate of the employees.

13 Q. And do you recall whether any of those companies are in
14 the state of Minnesota?

15 A. I don't recall whether they have operations in the state
16 of Minnesota. Some of them were large companies.

17 Q. And do you recall when -- First of all, do you recall the
18 identity of any of those companies?

19 A. No. I don't offhand.

20 Q. Do you recall whether they were self-insured plans?

21 A. No. I don't recall that.

22 Q. And do you recall when they instituted that differential
23 premium multiple risks?

24 A. No. I don't.

25 Q. Have we covered all five articles yet?

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1 A. I believe that we have.

2 Q. Okay.

3 (Recess taken.)

4 (Defendants' Exhibit 4211 was

5 marked for identification.)

6 BY MS. RICHARD-NELSON:

7 Q. I show you what's been marked, Mr. Browne, Defendants'

8 Exhibit 4211?

9 A. Okay.

10 Q. And ask whether you recognize that article?

11 A. Yes.

12 Q. Is this an article that you published in the Journal of

13 Actuarial Practice?

14 A. Yes.

15 Q. It's true, is it not, that this paper uses data from the

16 1977-78 National Medical Care Expenditure Survey?

17 A. Yes.

18 Q. And this was a peer reviewed study?

19 A. Yes.

20 Q. And that you relied on that survey?

21 A. Yes.

22 Q. And, in fact, in footnote 1 on page 71, do you see where

23 I am?

24 A. Yes. I do.

25 Q. You state, The richness of this data set allows the

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1 construction of the five measures of insurance used in this
2 study, do you not?

3 A. Yes. I do.

4 Q. And the data set you were referring to was the National
5 Medical Care Expenditure Survey conducted in '77 and '78; is
6 that correct?

7 A. That's correct.

8 Q. That's all the questions I have. I'm going to mark a
9 series of exhibits now. These are documents that you've
10 identified in your report that you either reviewed or relied
11 upon. I want to you tell me in each instance how relied you
12 upon it in formulating your opinion, if you relied upon it.

13 (Defendants' Exhibit 4212 was
14 marked for identification.)

15 BY MS. RICHARD-NELSON:

16 Q. Show you what's been marked as Defendants' 4212. This is
17 the Minnesota Prepaid Medical Assistance Program Plus Status
18 Report, dated October of 1995. Mr. Browne, did you review
19 this report in connection with preparing your opinions in
20 this case?

21 A. Yes.

22 Q. Did you rely on this report?

23 A. Yes.

24 Q. In what way did you rely on this report?

25 A. This report indicated to me that Blue Cross and Blue

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1 Shield employed a number of different strategies to control
2 health care costs.

3 Q. Where did you find that in this report? Do you know what
4 the PMAP program is?

5 A. Excuse me.

6 Q. Do you know what the Prepaid Medical Assistance Program
7 is?

8 A. I'm sorry. I thought this was an annual report. I'm
9 sorry.

10 Q. This is a Medicaid report of the state of Minnesota.

11 A. I'm sorry. I'm sorry. I'm getting a little tired, I
12 guess. Okay. Did I --

13 Q. Did you rely on the Minnesota Prepaid Medical Assistance
14 Program Status Report that is identified as Defendants'
15 Exhibit 4212 in preparing your opinions in this case?

16 A. I don't recall.

17 Q. You have no recollection?

18 A. That's right.

19 Q. Okay.

20 A. Do you want this back?

21 Q. No. That's an exhibit in the case. Was there anything
22 about managed care under Medicaid that played a role in your
23 opinions?

24 A. Not that I can think of.

25 (Defendants' Exhibit 4213 was

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1 marked for identification.)

2 BY MS. RICHARD-NELSON:

3 Q. Show you what's been marked as Defendants' Exhibit 4213.

4 This is a 1993 Master Group Contract with Medica Primary.

5 This is one of the options available to the state of

6 Minnesota employees in 1993. It's an HMO option.

7 A. Yes.

8 Q. Did you rely on this report in any way, Sir, in rendering
9 your opinions?

10 A. I reviewed this report.

11 Q. Did you rely on this report in any way in forming your
12 opinions?

13 A. Not that I recall.

14 Q. Did you understand that Medica is a competitor of Blue
15 Cross and Blue Shield of Minnesota?

16 A. I didn't know that.

17 Q. Do you understand that state employees have a variety of
18 options to take contracts with different carriers from
19 year-to-year?

20 A. Yes.

21 Q. And that in 1993, Medica was one of those options?

22 A. Okay.

23 Q. Do you have any understanding as to whether Medica has
24 ever incorporated a differential premium of any of its group
25 plans -- group policies?

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1 A. I don't know if it has or not.

2 Q. Can you think of any way in which you may have relied on
3 Defendants' Exhibit 4213 in reaching your opinions in this
4 case?

5 MR. WILSON: Objecting to the form.

6 THE WITNESS: Not that I recall right
7 now.

8 BY MS. RICHARD-NELSON:

9 Q. Well, I must say for record that this is your
10 deposition. This is my chance to understand how you relied
11 on documents you used in forming your opinions. So I'm going
12 to be concerned if you don't recall how you relied on a
13 series of documents and then all of sudden your memory is
14 refreshed later on. This is my opportunity to learn what the
15 basis of your opinions were and how you relied on documents.
16 So I ask you to the best you can to tell me how you might
17 have relied on each of these documents?

18 A. I appreciate your position and I'm doing the very best
19 that I can.

20 Q. And at this time you have no recollection of relying on
21 this exhibit; is that correct?

22 A. I have a recollection of reviewing it. I don't have a
23 recollection of how it might have helped develop my opinions
24 in this case. And I'm not trying to hide anything in that
25 regard from you.

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1 Q. No. I don't think you are.

2 (Defendants' Exhibit 4214 was
3 marked for identification.)

4 BY MS. RICHARD-NELSON:

5 Q. Mr. Brown, I show you what's been marked as Defendants'
6 Exhibit 4214 in this case. It is the Medica Primary 1992
7 Master Group Contract with the state of Minnesota. Can I
8 assume that you don't recall whether you relied on this
9 document either in forming your opinions?

10 A. That's right.

11 (Defendants' Exhibit 4215 was
12 marked for identification.)

13 BY MS. RICHARD-NELSON:

14 Q. Mr. Browne, I show you what's been marked as Defendants'
15 Exhibit 4215 in this case. This is a portion of the Medica
16 Choice Select 1993 Master Group Contract. Do you have any
17 understanding as to whether or not you relied on this
18 document in preparing your opinions in this case?

19 A. No. I don't.

20 (Defendants' Exhibit 4216 was
21 marked for identification.)

22 BY MS. RICHARD-NELSON:

23 Q. Mr. Browne, I show you what's been marked as Defendants'
24 Exhibit 4216. This is an Amendment to Certificate of
25 Coverage for one of the Medica Choice contracts, and I'm not

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1 certain which year. I believe it was identified in your
2 document in your report. Do you recall how it is that you
3 may have, if you did, rely on this document?

4 A. No. I don't.

5 (Defendants' Exhibit 4217 was
6 marked for identification.)

7 BY MS. RICHARD-NELSON:

8 Q. Mr. Browne, I show you what's been marked as Defendants'
9 Exhibit 4217. It is marked Confidential Minnesota Tobacco
10 Litigation as is Defendants' Exhibit 4214. Bates stamp MN
11 00206721 through MN 00206730. It is a portion of the Medica
12 Choice Select 1972 Master Group Contract between Medica and
13 the state of Minnesota. Do you have any recollection of
14 relying on this document in connection with formulating your
15 opinions in this case?

16 A. I have recollection of reading it, but not relying upon
17 it in the formulation of my opinions.

18 (Defendants' Exhibit 4218 was
19 marked for identification.)

20 BY MS. RICHARD-NELSON:

21 Q. Mr. Browne, I show you what's been marked as Defendants'
22 Exhibit 4218 in this case. It is a document marked
23 Confidential Minnesota Tobacco Litigation. It is a Medica
24 Choice Select Certificate of Coverage, and it can be found at
25 Bates stamp MN 00206731 through MN 00206789. Do you recall,

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1 Sir, whether you relied on this document in connection with
2 formulating your opinions in this case?

3 A. I recall reading the document, but I don't recall relying
4 on it in forming my opinions.

5 (Defendants' Exhibit 4219 was
6 marked for identification.)

7 BY MS. RICHARD-NELSON:

8 Q. Mr. Browne, I show you what's been marked as Defendants'
9 Exhibit 4219 in this case. It is a document marked
10 Confidential Minnesota Tobacco Litigation and can be found at
11 MN 00206790 - MN 00206848. It is a Medica Choice Select
12 Certificate of Coverage in connection with the Medica
13 contract with the state of Minnesota. Do you have any
14 recollection of relying on this document in connection with
15 formulating your opinions in this case?

16 A. No.

17 Q. Do you recall, Sir, seeing a series -- reviewing a series
18 of documents produced by Blue Cross and Blue Shield of
19 Minnesota in this case that calculate the settlement --
20 year-end settlement between the state of Minnesota and Blue
21 Cross for the self-insured state health plan?

22 A. Yes.

23 Q. Did you rely on any of those settlement documents in
24 connection with formulating your opinions in this case?

25 A. No.

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1 Q. Off the record.

2 (Whereupon, off the record.)

3 (Defendants' Exhibit 4220 was

4 marked for identification.)

5 BY MS. RICHARD-NELSON:

6 Q. I show you, Sir, what's been marked as Defendants'

7 Exhibit 4220 in this case. It is a memorandum from Touche
8 Ross to the Department of Employee Relation, dated February
9 14, 1985. The subject of matter which is the 1985 collective
10 bargaining position on health care program. It is stamped
11 Confidential Minnesota Tobacco Litigation and can be found at
12 MN 00438936 through MN 00438947.

13 Do you recall, Sir, relying on this document in
14 connection with formulating your opinions in this case?

15 A. No. I don't recall that.

16 Q. Do you recall earlier in this deposition that we looked
17 at a 1983 report from Touche Ross to the Department of
18 Employee Relations?

19 A. Yes.

20 Q. Do you recall whether Defendants' Exhibit 4220, in any
21 way, changes its recommendations made in 1983 to the
22 Department of Employee Relations by Touche Ross that they not
23 implement a differential based on smoking in their group
24 policy?

25 A. I don't recall whether there was a recommended change in

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1 that policy.

2 (Defendants' Exhibit 4221 was
3 marked for identification.)

4 BY MS. RICHARD-NELSON:

5 Q. Showing you, Mr. Browne, what's been marked Defendants'
6 Exhibit 4221. It is a draft copy of a report from Touche
7 Ross to the state of Minnesota Department of Employee
8 Relations entitled Group Insurance RFP. It can be found at
9 MN 00439236 - MN 00439251. Do you recall whether this
10 document -- you utilized this document in any way to
11 formulate your opinions?

12 A. No. I don't recall.

13 Q. You don't recall any way in which you relied on this
14 document; that is correct?

15 A. That's correct.

16 (Defendants' Exhibit 4222 was
17 marked for identification.)

18 BY MS. RICHARD-NELSON:

19 Q. Show you, Mr. Browne, what's marked as Defendants'
20 Exhibit 4222. It is a document entitled History of State
21 Benefits. It does have a cover sheet that says Legislation
22 on it. It can be found at MN 00440619 through MN 00440631.
23 In what way, Sir, did you rely on Defendants' Exhibit 4222?

24 A. This indicated to me that at certain points in the
25 state's history. Different premium contributions were

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1 required depending on the family composition that was
2 insured.

3 Q. Okay. Is there anything in Defendants' Exhibit 4222 that
4 addresses the implementation of a differential premium based
5 on any risk factor apart from dependent coverage?

6 A. None that I recall.

7 Q. Okay. Do you recall relying on any reports prepared for
8 the Department of Employee Relation by Touche Ross & Company?

9 A. I don't recall anything.

10 (Defendants' Exhibit 4223 was
11 marked for identification.)

12 BY MS. RICHARD-NELSON:

13 Q. Mr. Browne, I show you what's been marked as defendant
14 Exhibit 4223. Do you recall seeing this document before? Do
15 you recall that this is the study that Peat Marwick performed
16 for Blue Cross in 1983, after they inquired of Peat Marwick
17 whether there was an actuarial basis for developing a
18 differential premium --

19 (Whereupon, reporter interruption.)

20 Q. Do you recall whether Defendants' Exhibit 4223 is a study
21 done by Peat Marwick for Blue Cross and Blue Shield of
22 Minnesota at their request to develop an actuarial basis for
23 implementing a differential premium based on smoking in the
24 non-group market? The record should reflect that this
25 document is stamped Confidential Minnesota Tobacco Litigation

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1 and it is also Defendants' Exhibit 477. It can be found at
2 BCBS 00034877 through BCBS 00034884.

3 A. I don't recall this document.

4 Q. Do you recall any testimony by Ms. Busse that in 1983,
5 Mr. Niemiec requested Peat Marwick to do a study to see if
6 there was an actuarial basis for implementing a differential
7 premium in the non-group market?

8 A. Only very vaguely.

9 Q. Do you know whether or not Blue Cross and Blue Shield of
10 Minnesota adopted the recommended premium differential by
11 Peat Marwick?

12 A. I don't know if they did or not.

13 (Defendants' Exhibit 4224 was
14 marked for identification.)

15 BY MS. RICHARD-NELSON:

16 Q. Show you what's been marked as Defendants' Exhibit 4224,
17 previously marked in this litigation as Defendants' Exhibit
18 478. Can be found at BCBS 00191241 through BCBS 00191246.
19 It is entitled Nonsmokers Discount Background and Issues.
20 20th Annual Lawyers Workshop, May 7 - 9, 1986, by Robert J.
21 Milis, assistant vice-president and corporate counsel for
22 Blue Cross and Blue Shield of Minnesota. Do you recall
23 relying on Defendants' Exhibit 4224, Mr. Browne, in
24 formulating your opinions in this case?

25 A. No. I don't recall relying on this.

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1 Q. Do you recall any concern being raised about whether
2 implementing a differential premium would be discriminatory?

3 A. I encountered that argument in several different places.
4 I don't recall specifically seeing it in this document.

5 Q. Do you know who Mr. Milis is?

6 A. I see his title, but I don't know the man or --

7 Q. Okay. And have you reached any legal opinions as to
8 whether or not implementing a differential premium is
9 discriminatory under the law?

10 A. I haven't reached any legal opinions.

11 Q. Can you think of any other way in which you have relied
12 on Defendants' Exhibit 4224?

13 A. Not right now I can't. Or I don't have any recollection
14 of relying on it.

15 Q. Are we going to come back when he does recall.

16 (Defendants' Exhibit 4225 was
17 marked for identification.)

18 BY MS. RICHARD-NELSON:

19 Q. Mr. Browne, I show you what's been marked as Defendants'
20 Exhibit 4225. It's previously been marked as Defendants'
21 Exhibit 481 in this litigation. It can be found at BCBS
22 00033566 through BCBS 00033570. It is a memorandum dated May
23 18, 1983, to the Individual Product Task Force at Blue Cross
24 and Blue Shield of Minnesota from Susan Showalter regarding
25 the nonsmoking discount. Do you recall, Mr. Browne, if you

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1 relied on this document in formulating your opinions?

2 A. As I said previously, this supports other documents that
3 I've seen which suggest the use of differential premiums.

4 Q. In what setting?

5 A. What do you mean what setting?

6 Q. By a particular insurer or a particular product?

7 A. That, I don't recall.

8 Q. Do you recall understanding that in 1983 Blue Cross and
9 Blue Shield of Minnesota asked Ms. Showalter to prepare a
10 report to provide them with an actuarial basis for
11 implementing a non-group differential premium based on
12 smoking?

13 A. I have some recollection of that.

14 Q. Are you aware that Ms. Showalter has been deposed in this
15 litigation?

16 A. No.

17 Q. When you say in your report on the first page under your
18 opinion whether or not Blue Cross and Blue Shield of
19 Minnesota knew how to calculate differential employee
20 contribution rates for group health insurance products in
21 1978, what are the documents that form the basis of that
22 opinion, sir?

23 A. Blue Cross and Blue Shield of Minnesota is an insurance
24 company that understands, in my opinion, underwriting and
25 charging different premiums for different risks.

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1 Q. Apart from that, is there any other basis for your
2 opinion that they knew how to calculate differential employee
3 contribution rates for group health insurance products in
4 1978?

5 A. That's my basis for that opinion. There's nothing that I
6 could point to right now.

7 Q. No documents, for instance?

8 A. Nothing that I can point to right now.

9 Q. Do you have any reason to believe that Blue Cross and
10 Blue Shield of Minnesota had actuarial data supporting a
11 differential premium based on smoking prior to 1983?

12 MR. WILSON: Object to the form.

13 THE WITNESS: Again, I'm relying on
14 Judith Anne Busse's deposition.

15 BY MS. RICHARD-NELSON:

16 Q. Yes.

17 A. That as of 1983, information on diagnosis codes was
18 provided to them, and that prior to that time they didn't
19 have those codes, and subsequent to getting those codes they
20 could do those sorts of calculations.

21 Q. Subsequent to 1983?

22 A. Right.

23 Q. My question to you is: Do Blue Cross and Blue Shield of
24 Minnesota have an actuarial basis for concluding that smoking
25 caused increased health care costs that would form the basis

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1 of a recommendation for a differential premium to be approved
2 by the Department of Commerce prior to 1983?

3 MR. WILSON: Object to the form.

4 THE WITNESS: I don't know.

5 BY MS. RICHARD-NELSON:

6 Q. What knowledge did Blue Cross and Blue Shield of
7 Minnesota have prior to 1983, as to how to calculate
8 differential employee contribution rates and in what setting
9 had they done so?

10 MR. WILSON: Object to the form.

11 THE WITNESS: As I said before, they are
12 an insurance company that's experienced in setting different
13 premiums for different rating factors. And this is
14 consistent with that.

15 BY MS. RICHARD-NELSON:

16 Q. But we're talking about apples and oranges here. I'm not
17 talking about the utilization of factors for underwriting
18 here. Sure. For decades they've been utilizing age and
19 gender and the like to underwrite and to rate; isn't that
20 true? But now we're talking about differentiating premium in
21 the group setting, making one employee pay more than
22 another. It's a completely different question. My question
23 to you is: What experience did Blue Cross and Blue Shield of
24 Minnesota have prior to 1983, which would enable them to
25 differentiate a premium in a group setting as between

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1 employees based on smoking?

2 MR. WILSON: Object to the form.

3 THE WITNESS: And my answer is the same.

4 They're not very different.

5 BY MS. RICHARD-NELSON:

6 Q. Wouldn't you agree with me that in order for Blue Cross
7 and Blue Shield of Minnesota to develop a premium
8 differential based on smoking in 1978, they would have to
9 have an actuarial basis for doing so?

10 A. Yes.

11 Q. And that actuarial basis would, in part, require
12 literature, medical literature in the public domain,
13 connecting smoking with disease, would it not?

14 A. The actuarial basis wouldn't necessarily have to.

15 Q. It wouldn't?

16 A. No.

17 Q. You could associate -- or you could connect smoking with
18 increased health care costs without identifying diseases
19 associated with smoking?

20 MR. WILSON: Object to the form.

21 THE WITNESS: You're asking me for
22 actuarial purposes. Is in actuary what you do is look at
23 trends and data.

24 BY MS. RICHARD-NELSON:

25 Q. Right. But how do you determine what's smoking related?

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1 A. One thing that you could do is, I presume, is produce
2 averages.

3 Q. What do you mean by that?

4 A. Well, for instance, if you were averaging the costs of
5 people who drink and drive with the costs -- automobile
6 accident costs with people who don't drink, that's typically
7 what's done by actuaries, is averaging loss costs.

8 Q. On a given population, though, we have a group of people
9 called former smokers, do we not? And former smokers may
10 incur tobacco attributable health care costs, may they not?
11 And if we did averaging as between smokers and nonsmokers, we
12 wouldn't take that into account, would we?

13 MR. WILSON: Object to the form.

14 BY MS. RICHARD-NELSON:

15 Q. So we'd have to have some understanding, would we not, of
16 the diseases caused by smoking or the health care costs
17 associated with those diseases?

18 MR. WILSON: Object to the form.

19 THE WITNESS: Why?

20 BY MS. RICHARD-NELSON:

21 Q. In order to form a basis for charging a differential to
22 smokers?

23 MR. WILSON: Same objection. It's the
24 only one I can make.

25 THE WITNESS: That's not something I've

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1 ever been involved with.

2 BY MS. RICHARD-NELSON:

3 Q. So you don't have any basis upon which to judge whether
4 Blue Cross was able to do that in 1978, do you?

5 MR. WILSON: Object to the form.

6 THE WITNESS: The basis, as I said
7 earlier, is simply that Blue Cross and Blue Shield is an
8 insurance company that's familiar with underwriting and
9 pricing risk.

10 BY MS. RICHARD-NELSON:

11 Q. Is it your position that as of 1978, all insurance
12 companies who do underwriting and price risk could have
13 determined tobacco attributable health care costs and set
14 premiums accordingly, and differentiating as --
15 differentiated as between smokers and nonsmokers?

16 MR. WILSON: Object to the form.

17 THE WITNESS: No. I didn't say that.

18 BY MS. RICHARD-NELSON:

19 Q. Well, why could Blue Cross do that and other carriers
20 couldn't?

21 A. Well, for one, not all carriers even employ actuaries.

22 Q. So, the carriers who employ the actuaries could do it and
23 the carriers that don't employ the actuaries could not do
24 it. Is that your testimony?

25 A. If you didn't employ an actuary, you certainly couldn't

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1 do those sorts of pricing studies. You'd contract out for
2 them.

3 Q. So, any insurer could have done it, is that your opinion?

4 A. Or they could have hired someone.

5 Q. To do it?

6 A. Presumably.

7 Q. And you wouldn't, for instance, need to go to the
8 literature to determine whether there are tobacco
9 attributable health care costs?

10 MR. WILSON: Object to the form.

11 THE WITNESS: One more time, please.

12 BY MS. RICHARD-NELSON:

13 Q. And you wouldn't need to have to go to the literature to
14 determine whether there are tobacco attributable health care
15 costs?

16 MR. WILSON: Object to the form.

17 THE WITNESS: Is that different from what
18 you asked previously?

19 BY MS. RICHARD-NELSON:

20 Q. Is your answer, no, you don't have to go to the
21 literature? Do you have to go to the literature or not?

22 MR. WILSON: Object to the form.

23 THE WITNESS: Many times actuaries when
24 they're doing their pricing analysis don't go to the
25 literature, but instead produce averages.

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1 BY MS. RICHARD-NELSON:

2 Q. Do you know whether the Department of Commerce requires a
3 carrier in the state of Minnesota to have an actuarial basis
4 for a differential premium?

5 A. For tobacco use or for --

6 Q. Any differential premium?

7 A. Whether the Department of Insurance requires?

8 Q. The Department of Commerce. In approving that
9 differential premium, do they require an actuarial basis?

10 A. I don't know what the rules are in Minnesota. Different
11 states have different rate regulations. Some require it and
12 some don't.

13 Q. Do you have an understanding as to what their criteria
14 are for; that is, the Department of Commerce's criteria, in
15 approving or disapproving a differential rate?

16 A. No.

17 Q. So, do you have any understanding as to whether in 1978,
18 the Department of Commerce would have or could have approved
19 a differential rate based on smoking?

20 A. I don't know if they could have or could not have
21 approved it.

22 Q. Did you rely on any documents in formulating your opinion
23 that address the internal differential that Blue Cross has
24 implemented with its own employees?

25 A. Could you repeat that question.

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1 (Whereupon, Reporter read back.)

2 A. Addresses in what way? Are you asking me how they
3 developed the premium.

4 Q. I'm asking you whether you relied, Sir, in this case in
5 formulating your opinions, on any documents of any kind
6 relating to Blue Cross's internal differentiation in premium
7 based on smoking among its employees?

8 A. I relied on Judith Ann Busse's deposition indicating that
9 they do.

10 Q. Okay. Any documents? Here, I'll mark it.

11 A. Not that I recall. I recall indicating that they do.

12 (Defendants' Exhibit 4226 was
13 marked for identification.)

14 BY MS. RICHARD-NELSON:

15 Q. Mr. Browne, I show you what's been marked as Defendants'
16 Exhibit 4226. It's previously been marked in this litigation
17 as Defendants' Exhibit 483. It can be found to the BCBS
18 00191085 through 00191090. It is a memorandum on Blue Cross
19 letterhead to all employees from Jane Sagnes, dated November
20 26, 1986, entitled Open Enrollment.

21 (Whereupon, Reporter interruption.)

22 Q. Did you rely, Mr. Browne, on this document in connection
23 with formulating your opinions in this case?

24 A. This document indicates that there was a differential
25 premium charge for smokers and nonsmokers. So it's

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1 consistent with Judith Ann Busse's deposition.

2 Q. And how did you rely on this information in formulating
3 your opinions?

4 A. No more than I did relying on Judith Ann Busse's
5 deposition.

6 Q. And how did you rely on her deposition on this topic?

7 A. The topic being?

8 Q. The implementation of a differential premium for Blue
9 Cross employees based on smoking?

10 A. Simply that they do it.

11 Q. Okay. It's evidence, is it not, that Blue Cross has
12 taken the step that you recommend that they implement a
13 differential premium based on smoking where they can to
14 incentivize nonsmoking?

15 A. I don't believe that I recommended it, but it's my
16 opinion that this could be done and they have done it.

17 Q. Okay. So, your opinion is that it can be done and this
18 is evidence that they've done; is that correct?

19 A. This indicates they've done it.

20 Q. Does it -- do you recall rely on it for any other
21 purpose?

22 A. No.

23 Q. Do you recall relying on a series of internal memoranda
24 at Blue Cross which pertained to the subject of developing
25 differential premiums in the small group market based on

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1 smoking?

2 A. I have some recollection of reading about their small
3 group market, individual market.

4 Q. Do you recall whether any internal Blue Cross and Blue
5 Shield of Minnesota memoranda that addressed differential
6 premiums based on smoking, or documents that you relied on in
7 formulating your opinions in this case?

8 MR. WILSON: Object to the form.

9 THE WITNESS: I recall reading that they
10 had a program for charging different premiums for smokers and
11 nonsmokers. What those specific documents were, I can't
12 recall right now.

13 BY MS. RICHARD-NELSON:

14 Q. Do you recall whether you relied on any of that
15 information in formulating your opinions?

16 A. It demonstrated that they have a certain degree of
17 actuarial expertise.

18 Q. Didn't it demonstrate a commitment, too, to implementing
19 differential premiums where they could based on smoking?

20 MR. WILSON: Object to the form.

21 THE WITNESS: It showed that they're
22 offering those products.

23 (Defendants' Exhibit 4227 was
24 marked for identification.)

25 BY MS. RICHARD-NELSON:

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1 Q. Mr. Browne, I show you what's been marked as Defendants'
2 Deposition Exhibit 4227. It is a series of documents
3 produced by Blue Cross and Blue Shield in this case
4 pertaining to the subject of nonsmokers discount. At the
5 head of the packet is a document entitled Blue Cross and Blue
6 Shield of Minnesota Nonsmokers Discount. Do you see that?

7 A. Yes. I do.

8 Q. Do you recall reviewing these documents?

9 A. Yes.

10 Q. Do you recall understanding that the implementation of
11 the nonsmoker discount in 1983, was a strong commitment to
12 wellness on the part of Blue Cross and Blue Shield of
13 Minnesota?

14 MR. WILSON: Object to the form.

15 THE WITNESS: I can't really say whether
16 it was a strong commitment or not. They did have products
17 that they offered.

18 BY MS. RICHARD-NELSON:

19 Q. Let me ask you this: Are you critical in any way of Blue
20 Cross and Blue Shield of Minnesota in connection with the
21 implementation of its differential premium based on smoking?

22 A. No.

23 Q. Are you critical of Blue Cross and Blue Shield of
24 Minnesota in any respect in this case?

25 A. How do you mean critical?

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1 Q. Do you have some criticism of Blue Cross and Blue Shield
2 of Minnesota as an expert on behalf of the tobacco industry?

3 A. I was not asked, nor have I attempted to gather any
4 information that would be critical to them beyond opinions
5 we've already talked about.

6 Q. Have we talked about any opinions in which you are
7 critical of Blue Cross and Blue Shield of Minnesota?

8 A. Well --

9 MR. WILSON: Object to the form.

10 THE WITNESS: That's a bit subjective.
11 But the opinions that we've gone through are it. I don't
12 think that they're particularly critical. So my subjective
13 answer would be no.

14 BY MS. RICHARD-NELSON:

15 Q. As you sit here today, can you think of anything else
16 Blue Cross and Blue Shield in Minnesota could have done from
17 1983 to the present to attempt to incentivize nonsmoking?

18 MR. WILSON: Object to the form.

19 THE WITNESS: That's such a broad
20 question. They could have taken out TV ads. Newspaper ads.

21 BY MS. RICHARD-NELSON:

22 Q. Do you know if they did that?

23 A. I don't know.

24 Q. So, do you have any evidence of anything you can be
25 critical about Blue Cross and Blue Shield of Minnesota since

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1 1983, in connection with its efforts to incentivize
2 nonsmoking?

3 MR. WILSON: Object to the form.

4 THE WITNESS: Not as we're talking
5 about.

6 BY MS. RICHARD-NELSON:

7 Q. Is there anything that you can think of that Blue Cross
8 and Blue Shield of Minnesota could have done and didn't do at
9 any time from 1977 to the present to reduce the tobacco
10 attributable health care costs that it pays to its providers?

11 MR. WILSON: Object to the form.

12 THE WITNESS: The items that we talked
13 about earlier.

14 BY MS. RICHARD-NELSON:

15 Q. What could Blue Cross and Blue Shield of Minnesota have
16 done that it hasn't done?

17 MR. WILSON: Object to the form.

18 BY MS. RICHARD-NELSON:

19 Q. I'm not talking about employer groups now. I'm talking
20 about what Blue Cross and Blue Shield of Minnesota could have
21 done that you take the position they didn't do that would
22 have mitigated or reduced the tobacco attributable health
23 care costs that they pay to their providers?

24 MR. WILSON: Object to the form.

25 THE WITNESS: Well, they set premiums for

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1 groups and that creates an incentive for employers to promote
2 not smoking.

3 BY MS. RICHARD-NELSON:

4 Q. And they've done that, have they not?

5 A. Yes.

6 Q. Okay. I'm asking you what they could have done that they
7 didn't do?

8 MR. WILSON: Object to the form.

9 BY MS. RICHARD-NELSON:

10 Q. If you can think of any?

11 A. I can't think of anything. I'm not familiar with all
12 they've done.

13 Q. Do you recall reviewing a series of reports written by
14 Milliman and Robertson?

15 A. Those are the Bloom reports that we talked about
16 earlier?

17 Q. Yes. Well, you reference the 1992 report in your
18 report. But do you recall reviewing the 1987 or the 1991
19 reports?

20 A. I recall two reports.

21 Q. Well, we've talked about the 1992 report to the
22 Department of Commerce, have we not?

23 A. That's correct.

24 Q. Okay.

25 (Defendants' Exhibit 4228 was

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1 marked for identification.)

2 BY MS. RICHARD-NELSON:

3 Q. I show you what's been marked as Defendants' Exhibit
4 4228, Mr. Browne. It has previously been marked in this
5 litigation as Defendants' Exhibit 108. It is the report of
6 Milliman & Robertson entitled Health Risks and Behavior: The
7 Impact on Medical Costs. If it helps you at all, this is
8 sometimes referred to as the Brink report. Did this ring a
9 bell?

10 A. The Brink report doesn't. This is from 1992; is that
11 correct?

12 Q. No. This is from 1987. We've already discussed 1992.
13 I'm trying to refresh your recollection on the other Milliman
14 & Robertson report that exist.

15 A. Okay.

16 Q. Do you have any recollection of this report at all?

17 A. I have a recollection of the '92 report, but not the '87
18 report.

19 Q. Okay. So, is it fair for me to assume that you didn't
20 rely on the 1987 report in formulating your opinions?

21 A. I think that's a fair assessment.

22 (Defendants' Exhibit 4229 was
23 marked for identification.)

24 BY MS. RICHARD-NELSON:

25 Q. I show you what's been marked as Defendants' Exhibit

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1 4229. This is the October 22, 1991 report that Milliman &
2 Robertson did for Blue Cross and Blue Shield of Minnesota.
3 It's called the Non-Group Rating Factor Study. It's been
4 marked Confidential Minnesota Tobacco Litigation. It's been
5 previously marked as Defendants' Exhibit 491. It can be
6 found at BCBS 00024655 through BCBS 00024715. Do you have a
7 recollection of this study done by Milliman & Robertson for
8 Blue Cross and Blue Shield of Minnesota?

9 A. I don't recall it.

10 Q. Do you recall ever reviewing a report prepared by
11 Milliman & Robertson for Blue Cross and Blue Shield of
12 Minnesota which gave them actuarial advice on setting a
13 differential premium based on smoking in the non-group
14 market?

15 A. I don't recall that.

16 Q. Okay. Is it fair for me to assume, then, that you did
17 not rely on Defendants' Exhibit 4229 in formulating your
18 opinion?

19 A. Since I don't recall seeing it, I think that's a fair
20 assessment, although it does support the idea that this sort
21 of thing could be done.

22 Q. And was done by Blue Cross and Blue Shield of Minnesota,
23 correct?

24 A. Apparently, yes.

25 Q. Do you recall reviewing the Blue Cross and Blue Shield of

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- 1 Minnesota Story, A 60 year history?
- 2 A. Yes.
- 3 Q. Do you recall whether you relied on that history in
- 4 formulating your opinions?
- 5 A. Yes.
- 6 Q. In what way did you do so?
- 7 A. I wanted to find out whether Blue Cross and Blue Shield
- 8 was involved with community rating during the time period.
- 9 Q. And what did you --
- 10 A. That's a question.
- 11 Q. And what did you learn?
- 12 A. My recollection is that they were doing community rating
- 13 in the early 1960's.
- 14 Q. Is there any other way in which you relied on the Blue
- 15 Cross and Blue Shield of Minnesota Story, A 60 year history?
- 16 A. It familiarizes me with the company, showed that they've
- 17 introduced different products, responded to changing economic
- 18 environment in different ways. So that was important.
- 19 Q. They've engaged in cost-containment initiatives over the
- 20 years in an effort to contain their costs?
- 21 A. Yes.
- 22 Q. Apart from that testimony, can you think of any other way
- 23 in which you relied on the Blue Cross and Blue Shield of
- 24 Minnesota Story, A 60 year history?
- 25 A. I can't.

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1 Q. Okay. Isn't it true, Mr. Browne, that you reviewed a
2 group of annual reports of Blue Cross and Blue Shield of
3 Minnesota?

4 A. Yes.

5 Q. Spanning from 1969 to 1993; is that true?

6 A. That could well be true. It did not include all years.

7 Q. Okay. And in what way did you rely on those annual
8 reports, Sir?

9 A. Those reports, as with the 60-year history that we talked
10 about, indicated to me that Blue Cross and Blue Shield
11 responded to changing economic conditions and market
12 conditions in a variety of different ways.

13 Q. Beyond that, did you rely on those annual reports for any
14 purpose?

15 A. I don't believe so.

16 Q. Okay. If you give me five minutes, I'll try to wrap-up.

17 (Recess taken.)

18 MS. RICHARD-NELSON: I have no further
19 questions.

20 MR. WILSON: Okay. We'll read and sign.
21 So if you send it to me, I'll take care of that.

22 (Whereupon, the deposition concluded at
23 approximately 5:05 P.M.)

24

25

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1 C E R T I F I C A T E

2 I, Sandra K. Fellows, hereby certify that I am
3 qualified as a verbatim shorthand reporter, that I took in
4 stenographic shorthand the foregoing deposition of MARK
5 JOSEPH BROWNE, Ph.D., at the time and place aforesaid, and
6 that the foregoing transcript consisting of 219 pages is a
7 true and correct, full and complete transcription of said
8 shorthand notes, to the best of my ability.

9 Dated at Minneapolis, Minnesota, this 19th day of
10 September, 1997.

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